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THE LAW AND THE CONSTITUTION

by

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Of Gray's Inn, Barrister-at-Law*

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TO
HAROLD J. LASKI

PREFACE TO THE THIRD EDITION

It is pleasing to reflect that in time of war a demand can arise for a new edition of a book on the British Constitution. It would not be easy, however, to adapt a book last published in 1938 to the circumstances of the war. There would be no necessity to make substantial alterations. The doctrines enunciated in 1933 and put with greater cogency in 1938 have not changed. The modifications would be almost entirely in the form of footnotes and would refer to specific provisions of Defence Regulations and other temporary rules which will not, one hopes, survive for long. After reading the book through I came to the conclusion that the only satisfactory plan was to leave the text exactly as it stood in 1938, but to add a short Introduction indicating the application of the argument to the conditions of war. This plan, too, suited my own convenience. It would be difficult to get the necessary material over the several thousand miles of perilous ocean which separate me from London. Nor would it be easy, in the midst of the first session of the University of Ceylon, to find the time to amend the details.

W. IVOR JENNINGS.

UNIVERSITY OF CEYLON, COLOMBO.

11th December, 1942.

PREFACE TO THE SECOND EDITION

DICEY is reported to have told a Harvard audience, long after the first publication of his *Law of the Constitution*, that if you scratch an Englishman you will find a socialist. It is doubtful if even a pick-axe would have produced such a discovery in Dicey himself, and what he meant by "socialist" is not what we mean by it now. It is nevertheless true that during the past sixty or seventy years the British Constitution has been profoundly modified under the influence of collectivist ideas. New institutions have been created, and new powers conferred on existing institutions. This development has been due in part, though in part only, to the extension of the franchise; and the traditional institutions of democratic and responsible government, such as those of Cabinet, Prime Minister, Parliament, and Civil Service, have had to adapt themselves for the control of greatly extended functions under the ultimate control of a vast electorate. During the same period the essential ideas on constitutional law and constitutional government have been the subject of close analysis by a long series of brilliant writers, of whom the French appear to me to have contributed most in recent years.

The first edition of this book was an attempt to expound in a short and elementary fashion the relations between the law and the institutions of the modern Constitution. It was not a text-book on constitutional

law. Nor did I seek to describe at length what must necessarily be the first introduction to any constitution, the methods by which government operated. I was then, and am still, preparing a comprehensive work on that subject. The first volume was published in 1936 as *Cabinet Government*; I hope that the second, on *Parliament*, will be available within a year. Nor, again, was I concerned directly with the competing "ideologies" which have produced the modern Constitution. These must necessarily be studied in association with the organisation and operation of political parties; and, though I have collected much material on the subject, I am not yet prepared for publication. I was, however, anxious to provide, especially for my own students, an introduction to the relations between law and government which would not assume that the Constitution so ably described by Blackstone, or Bagehot, or Dicey, was still in existence.

It is, of course, easier to write a long book than a short one and a learned book than an elementary one. I suppose that what is required is a five-volume treatise on constitutional law which would set out in the first thousand pages the general principles of public law, and which would discuss and analyse at length the ideas expounded in the similar works of the great continental authorities and in the books on political science in English. Like the continental authorities, I could then have summarised my thousand pages in two hundred pages of a *précis élémentaire*, and there would have been no fear of my being misunderstood by learned writers. Unfortunately, there was and is no

prospect of my producing the five volumes; but I could not go on recommending to my students books which appeared to me to be at least fifty years out of date. I was therefore compelled to assume many things without explanation, including the general methodology of public law. For historical reasons that subject has become divided into three branches in England, known respectively as constitutional law, political science, and the more important part of jurisprudence. Actually, they require no more than a slight change of emphasis, so that an introductory book must deal with matter common to all three, though my own emphasis was naturally that of the constitutional lawyer. I have not incorporated such methodological material in this edition, though I have expanded and rewritten passages which appeared open to misconstruction. In the process the book has become substantially larger, a fact which I much regret; but I hope that as a result it will receive even wider acceptance as a reasonably objective statement of the present relations between law and government in the modern Constitution. In making these changes I have been much assisted by many friends. I cannot mention all of them; but in addition to those mentioned in the preface to the first edition I would like to acknowledge my special debt of gratitude to Professor Eugene Forsey of McGill, Mr. A. D. Hargreaves of Birmingham, Dr. W. A. Robson of the London School of Economics, Dr. E. C. S. Wade of Cambridge, and Mr. B. A. Wortley of Manchester.

It remains to specify the more important of the changes. Chapter I was found difficult, and many

readers did not like the abrupt introduction to Montesquieu. I have postponed him to a later section and provided a more historical introduction. The whole chapter has been rewritten and expanded, and the difficult analysis of the Separation of Powers put in an appendix. The whole of the first section of Chapter II has been rewritten and expanded, and the phrase "Rule of Law" restored to prominence. It is frequently used in ordinary speech without an individualist connotation, it was used by Jowett in his translation of Aristotle, and it is recognised by continental writers as the best translation of *Rechtsstaat*. I rejected it in the first edition because I did not want it to be understood in Dicey's sense; I have now paid less attention to Dicey in the text, but have made the criticism in Appendix II more explanatory.

The changes in Chapter III are chiefly by way of addition. The contention that there is no fundamental distinction between laws and conventions is illustrated by examples in which statutes imply conventions and judges are called upon to apply them. My dogmatic assertion that law cannot in the last resort be based on force is supported by a note in Appendix III, still dogmatic, but more explanatory than the statement in the first edition. The changes in Chapters IV to VI are mostly incidental. I have deleted the section on the flexibility of the Constitution, which was inserted in the first edition as an afterthought and interrupted the normal course of exposition. Long notes elaborate the relations between international law and the common law, and the nature of what Dicey called *droit administratif* and I call administrative law.

In Chapter VII I have slightly modified the language and brought in recent developments, but have left the substance intact. I would emphasise that the attitude of the modern public lawyer to the courts is essentially different from that of the private lawyer. For the former, they are merely one set of Governmental institutions among several and not the *fons et origo* of the law. While they exercise essential functions in public law, they are ancillary functions. So far as the material of the public lawyer is in the law of England—and most of it is not—he looks essentially to legislation, most of which is brought into the courts only for the purpose of interpretation.

Chapter VIII has been much modified and in part rewritten. It appears to have received more criticism than any other chapter, partly because it was critical and not constructive, and partly because language familiar to lawyers but not to others was used without explanation. For instance, if one denies that any “right” of public meeting exists, the non-lawyer tends to assume that there is no liberty to meet in public. I have tried to make clear what was originally intended, and I have also brought in the changes necessitated by recent legislation and judicial decisions, though the latter have shown that my analysis was unfortunately (as I may say in a preface) correct.

It should perhaps be added that on the suggestion of Mr. A. D. Hargreaves I have tried to avoid the ambiguity of the word “function.” By a “function of government” I mean an activity of a governmental

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authority. I do not say that there are three functions
of government, but that there are three classes of
functions.

W. IVOR JENNINGS.

LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE
(UNIVERSITY OF LONDON),
February 1938

PREFACE TO THE FIRST EDITION

IN these days constitutions come like water; and even if they do not go like wind, strange things happen to them which were not contemplated by their framers. Economic disorder and social unrest warp the development of political institutions where they do not destroy them. Nor is a written constitution any very effective defence against disruptive tendencies. Indeed, a written constitution tends to obscure the fundamental changes which are taking place, and constitutional lawyers explain a political system which exists on paper and not in practice. A British public lawyer fears no such danger. But he faces a difficulty which is perhaps a peculiarity of British constitutional development. Political changes in the United Kingdom are masked by our use of fictions. Institutions are rarely abolished; they continue in theory, but shorn of their essential functions. Names remain in constant use, but they represent different things. The British Constitution has in truth changed enormously during the past fifty years, and the Constitution of to-day is only superficially like that of the third Reform Act.

My purpose in this book is to explain the fundamental ideas underlying the modern Constitution. I have sought to go behind the names and the forms and to determine the principles which determine the relations and functions of the various political authorities. But I have gone no further: I have not attempted to

justify or to criticise the structure of British society, or to explain why that society has produced its peculiar political organisms, or to suggest the consequences which social and political organisation produces for ordinary men. These are matters eminently worthy of being discussed; but they are not matters for the constitutional lawyer as such.

A constitution, in anything more than a formal sense, is only an organisation of men and women. Its character depends upon the character of the people engaged in governing and being governed. In this respect it is a transient thing, changing like the colours of the kaleidoscope; and an examination of its working involves an examination of the social and political forces which make for changes in the ideas and desires and habits of the population and its various social strata. A public lawyer will not understand his constitution unless he understands these aspects of it—indeed, I would assert that no lawyer understands any part of the law until he knows the social conditions that produce it and its consequences for the people who are governed by it. But the lawyer's peculiar contribution to the study of political society is the examination of the principles which at any given time are regulating the relations of political institutions. For though the Constitution consists of men and not of laws, the complexity of political organisation demands that if it is to function at all it must function according to rule.

Many of the rules are of small general importance. They are followed by the courts in the determination of individual issues. They are of interest only to the lawyer who is called upon to advise a client as to his

constitutional position. They can be found set out in detail in any work on constitutional law. But there are more fundamental principles determining the structure of the constitutional machine and the mode of its operation, and a knowledge of these is essential to anyone concerned with the problems of government. These are the principles which I have sought to expound, in the belief that a knowledge of them is a preliminary not only to the study of the detailed rules of constitutional law, but also to the study of the British system of government. In doing so, I cannot quote what the lawyer regards as "authority": indeed, I have had to discuss whence that "authority" is derived. Consequently, though I am concerned with facts, they are facts which need to be interpreted, and I neither believe nor even hope that everybody will agree with my interpretation. It is not the least of the merits of the study of public law that the main purpose of the student is not to apply a narrow legal technique, but to discuss fundamental principles about which he is entitled to hold his own opinions against the combined judicial authority of the House of Lords.

Anyone who has studied the British Constitution during the past fifty years must owe a great debt of gratitude to the late Professor A. V. Dicey. The frequency with which I have quoted him indicates the extent of my own obligation. Looking back to the Constitution of 1884 which he was analysing (for he did not substantially change his ideas in the later editions of his book), I do not think that his interpretation was in every respect correct. Since then there have been fundamental changes, and few of his prin-

ciples appear to me to be applicable to the modern Constitution. For the coming of what in his later work Dicey called "the period of collectivism" has changed the constitutional organisation, the practice of government, and the principles of political action. Nevertheless, we must not fail to remember that he was the first to apply the juridical method to English public law. His book is the great classical authority on the legal principles of the British Constitution.

Another obligation must be mentioned, though it is personal to myself. A public lawyer at the London School of Economics and Political Science must necessarily be in close contact with the Department of Government of that institution, a Department whose international reputation does not need advertisement from me. My obligation to its members cannot easily be exaggerated. Most of the ideas in this book have been discussed with Professor H. J. Laski and Mr. K. B. Smellie in particular. They have not always agreed with me, nor even with each other, but they have invariably given me arguments to think over.

W. I. J.

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INTRODUCTION

THE LAW AND THE CONSTITUTION IN WARTIME

It is typical of the British Constitution that the most important constitutional change due to the present war was brought about so completely informally that the members of the public do not know when, or by whom, it was brought about. The change was the temporary abdication of the Opposition. Shortly before August 24th, 1939, there was an agreement between the then Government and the then Opposition that there should be an "electoral truce." In terms, this meant only that the Labour party would not nominate candidates to oppose Government candidates at bye-elections, and that the Government parties would not nominate candidates to oppose Labour party candidates at bye-elections, but that the party which held the seat should continue to do so. In other words, the normal democratic process was suspended. It is, of course, true that there is nothing to prevent other candidates from being nominated; but an election is for all practical purposes a conflict between the rival parties; and if they leave the field clear the elector has no effective choice. This was followed by the enactment of a Bill to prolong the life of the House of Commons. The general election which might have been held in 1939 and which must have been held by 1940, has thus been postponed until the end of the war,

and casual vacancies, with few exceptions, have been filled by nominees of the parties whose representatives held the constituencies in 1939. This in itself is an important change, because it removes, or at least minimises, one of the most important factors in the British Constitution, the pressure which constituents exercise upon their members because of their own power, in a short space, to change their party allegiance. The House of Commons is necessarily less responsive to public opinion.

Nor was the "electoral truce" the only result of this backstairs decision. It became in effect a party truce. For the first eight months of war the Opposition attacked the Government on its social policy but supported the Government on its war policy. With the resignation of Mr. Chamberlain in May 1940, the way was clear for the total disappearance of the Opposition. Leaders of the Labour and Liberal parties joined the new Government, and only the four members of the Independent Labour Party (subsequently reduced to three) and the Communist member (who became a supporter of the Government on the day that the Germans attacked the U.S.S.R.) were left to conduct a sort of guerilla warfare.

The British system is a system of party government, and for the duration of the war party government has disappeared. Here undoubtedly is the fundamental change. The maintenance of the rule of law, as defined in Chapter II of this book, depends primarily on the vigilance of the Opposition in the House of Commons and on the pressure which public opinion exerts upon that House. The most effective means for

the maintenance of the fundamental liberties discussed in Chapter VIII consists in the resistance of the Opposition to changes in the law which interfere with those liberties. Now, there is no Opposition. The British Constitution is, however, an adaptable instrument. Like the Chinese armies, it may be regarded as a cushion. If it is punched in one place, it bulges in another. The effect of the disappearance of the Opposition has been the rediscovery of the private member. At a very early stage of the war the House established a Select Committee on National Expenditure consisting wholly of private members. There are few activities of the State which do not require expenditure, and a Select Committee on expenditure is almost a Select Committee on the conduct of government. The Committee has been in almost constant session, and the effect of its investigations has been not merely to secure the reform of some abuses but, what is much more important, to prevent many abuses from being committed. A Department which is aware that its activities will be open to examination by prying private members must necessarily act far more circumspectly than a Department which merely needs to put up a plausible speech for its Minister if it is found out. The accountant, so to speak, has not merely to justify his accounts at the annual general meeting; he has also to let the auditor see his vouchers, and he does not know when the auditor will arrive.

It would be wrong to assume, however, that the Select Committee on National Expenditure can take the place of the Opposition, particularly in respect of

those aspects of the Constitution which are emphasised in this book. The protection of the interests of minorities and the liberties of individuals is not a matter of protecting the taxpayer as such. It requires the criticism of administrative action which is oppressive to the individual. In this respect the private member has continued to play his part in spite of the fact that he has had no "official" Opposition to stand behind him when he asks to move an urgency motion for the adjournment or to vote with him when he challenges the Minister in the lobby. Three outstanding examples are the successful agitation to alleviate the lot of interned aliens after the evacuation from Dunkirk, the constant criticism of the working of some of the Defence Regulations (especially Regulation 18B), and the agitation to permit the republication of the *Daily Worker*. It is immaterial whether the Government was right or wrong in these matters; what is important is that the House of Commons has provided the forum in which grievances might be brought to the attention of the Government and the pressure of public opinion exerted.

It would be equally wrong to assume that the House of Commons has performed this task as efficiently as it would have done in normal times. The existence of the Opposition on the benches facing the Government gives great moral support to a private member with an individual grievance to air. It is much easier to challenge Horatius when the ranks of Tuscany are drawn up behind. Nor has the House of Commons been as closely in touch with public opinion under the conditions of war. Most of its members were elected

in 1935 on a "ticket" which is no longer relevant. Most of the rest have had a free pass and have not been chosen by the electors in any true sense. Also, much of the procedure of the House has been conducted in secret session, and the use of the House as a sounding-board for public opinion has been correspondingly restricted. There is no doubt that occasional secret sessions are an advantage. They enable some of the secrets of war to be explained to a limited number of persons so that action may be justified and criticism informed. Their frequent use, however, prevents the House from keeping in touch with the feeling of the country.

Even these restrictions on free elections and on the public expression of complaints in the House of Commons do not detract from the truth of the assertion that the United Kingdom is far from being a dictatorship. Some of the expressions in this book must certainly be modified in time of war. There is no Opposition, and elections are free only in theory so long as the major parties are not contestants. Were this situation to continue for long, the bases of the British Constitution would be overthrown. Nevertheless, a reasonably representative House of Commons remains to carry on a peacetime tradition through a war which it regards only as an interlude. Mr. Churchill's eulogies on our free Parliament are no doubt exaggerated so long as he controls over 600 votes; but he holds office on sufferance only, and only so long as he has those votes. Nor, indeed, is it necessary that the votes be cast against him. Mr. Chamberlain in May 1940 had a majority of votes.

He won the critical division and lost the debate. The House can turn out Governments: but far more important for present purposes is that it can still protect the individual. It is far from being a collection of rubber stamps.

EMERGENCY POWERS AND THE RULE OF LAW

It was remarked in the preface to the second edition of this work that "during the past sixty or seventy years the British Constitution has been profoundly modified under the influence of collectivist ideas." The element of collectivism is a matter of degree. The collectivist State required for "total war" bears little comparison with the highly individualist State which is described in the body of this book. The Emergency Powers (Defence) Act, 1940, provides that the powers conferred by the Emergency Powers (Defence) Act, 1939, shall include power by Order in Council to make such Defence Regulations making provision for requiring persons to place themselves, their services, and their property at the disposal of His Majesty, as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order, or the efficient prosecution of the war, or for maintaining supplies or services essential to the life of the community. This Act hardly extended the powers given by the Act of 1939, if it extended them at all. It was passed rather as a defiance to an aggressor who had swept into his domain the whole of Western Europe, save the British Isles and the Iberian Peninsula, than as a means of acquiring additional powers. It put into a legal

formula the "blood and tears and sweat" that Mr. Churchill had promised as the British contribution to the war effort. Nevertheless, it provides a convenient text on which to hang the story of the law and the Constitution in time of war.

Under the Emergency Powers (Defence) Acts, the State has conscripted labour, male and female, not only for the armed forces, but also for civil defence and industry. Though there has been nothing like so extensive a conscription of property, vast trades in foodstuffs and raw materials are Government monopolies, most industries are operating under licence, and control is taken wherever commerce and industry cannot otherwise be planned to fit into the scheme of war. Such a "nationalisation of the means of production, distribution and exchange" has necessarily required a large increase in the Administration and a very substantial extension of administrative law. The expansion of the Administration has been brought about mainly within the framework of the normal governmental system. New Ministries sprang up like mushrooms at the outbreak of war, and some of them have changed their designation and functions as the war progressed. The essential problem has been to secure co-ordination, a problem rendered all the more acute by the insistent demands of the three armed forces for man-power, land and material. The essential constitutional principles have, however, remained unaltered. Each service has been administered by persons in the employment of Government and under the control of Ministers responsible to the House of Commons, or by persons in the employment of a

local authority under the control of that authority. The peacetime tendency to place services under the control of "independent statutory authorities" has not been followed in any substantial measure.

The two changes of substantial importance have been the creation of the Regional Commissioners and the reduction in the size of the Cabinet. The conventional character of the British Constitution has been illustrated by both, for in both cases only incidental legislation was required. The Regional Commissioners Act, 1939, does no more than authorise the payment of salaries. It does not indicate who the Commissioners are to be nor what are to be their functions. Their powers depend upon the extent to which Government Departments under Defence Regulations and otherwise delegate functions to them. In the main they have acted as co-ordinating authorities for civil defence. Their real importance would be exhibited only if an invasion occurred. The whole island has been divided into defence areas, and under a Defence Regulation the Commissioners have power to issue orders or directions "for the purpose of meeting or hindering any actual or apprehended attack by an enemy or of protecting persons and property from the damage involved in any such attack." This Regulation is wide enough to cover the case of an attack by air; but its real value would be demonstrated only if an invasion occurred and communications with the Central Government became difficult. In that event, of course, the whole working constitution would be essentially different. Up to the moment of writing, however, it can be said that the

British Constitution at war is in all essentials the same as the British Constitution in time of peace.

The reduction in the size of the Cabinet is less important. The composition of the War Cabinet has differed from time to time, and it has never been formed on any consistent principle. Since Mr. Churchill assumed office the three Service Departments have always been excluded because he has represented them as Minister of Defence. Other Departments have sometimes been represented and sometimes not. The responsibility of the War Cabinet for every action of a Department has, however, remained unimpaired, and the responsibility of individual Ministers to the House of Commons has not been altered. Consequently, the general control of administrative powers remains in substance as it was before the war. What has changed is the extent of those powers. This in itself is, of course, extremely important: for one of the lessons which this book sought to convey (in contradistinction to the ideas enunciated by Dicey) was that individual liberty is not so much a question of legal remedies as of governmental powers. There has been no limitation of the remedies available to the citizen; his liberty has been restricted because governmental powers have increased. Wartime legislation has not required any change to be made in Chapter VII, which deals with the Courts and the Constitution. The courts are still independent. They continue to use their normal procedure. They still have all the methods of judicial control. What has changed have been the powers of Government. The wider the powers, the greater the

restriction and the smaller the field within which judicial remedies can operate. It is possible, therefore, that the wartime reader will appreciate more readily than the peacetime reader the argument that judicial remedies are incidental, and that a description of powers is more relevant than a description of remedies.

It would be impossible to give a description of the wartime powers of Government. In large measure the legislative powers of Parliament have been superseded by the legislative powers of the Crown under the Emergency Powers (Defence) Acts. Parliament in fact legislates only when the legislation cannot strictly be brought within the empowering clause of those Acts, or when the legislation is intended to remain in operation for a longer period than the duration of the emergency, or when funds are being voted. Funds are voted mainly in the form of votes of credit, without detailed Estimates, and without subsequent accounting. The legislative powers of the Crown extend to the repeal, for the duration of the emergency, of Acts of Parliament: and the list published in the consolidated editions of the Defence Regulations shows to what substantial extent this power has been exercised. This vast legislative power is, of course, contrary to the principles of the British Constitution as enunciated by Dicey: but the constitutional lawyer is concerned with the principles of the Constitution as it is, and the Constitution that exists for the duration of the war is a Constitution in which Parliament is a debating assembly and not a legislative body.

When the Crown makes law it gives at least as wide

a discretion to Ministers and other governmental authorities as Parliament itself was accustomed to do. The Defence Regulations abound with the discretionary "may," and the compulsive "shall" is rarely included, except in so far as the Regulations impose duties upon citizens. Criminal offences are often created subject to some such exception as "with permission granted by or on behalf of the Secretary of State," or "subject to any exemptions for which provision may be made by order of the Secretary of State." The phrase "if it appears to a Secretary of State to be necessary or expedient," is of common occurrence. The House of Lords in *Liversidge v. Anderson* even decided that the phrase "if the Secretary of State has reasonable cause to believe," means "if the Secretary of State thinks that he has reasonable cause to believe." Much ink has been spread over that decision; but an examination of the Defence Regulations shows that it is of little importance. Generally the requirement of "reasonable cause" is absent from the wartime powers. The debates in Parliament show that both Houses recognise the necessity of a power to imprison without trial, and the only difference of opinion is as to the extent of the limitations to be placed on the power. Parliament very reasonably considers that, though many other powers may be conferred without restriction on discretion, the power to imprison without trial is in its nature so likely to be abused that there should be some limitation. Personal liberty is so precious that it ought not to be interfered with on account of politics or policy. Even so, it may be doubted whether

imprisonment in an internment camp is in its nature more serious than conscription for military service or civil duties. The difference is very largely psychological. There is a stigma attached to internment, while there is some satisfaction to be obtained from doing one's duty to one's country. Also, the sailor, the soldier, the airman and the conscripted civilian have their "off-duty" periods when at least they feel that they are free, though the restrictions upon them are in fact many. It may be doubted whether the gunner who has been dumped in the middle of a Ceylon jungle because his country wants him there is freer than the person who is interned in the Isle of Man because his country thinks that it is safer to have him there; but he certainly feels very much freer, and at least he gets an occasional leave in Colombo.

War teaches us, in fact, that the psychology of government is more important than the forms of government. The strength of Britain lies in its ability, in time of danger, to secure the full collaboration of its own people and of the great majority of the people of five of the six Dominions. Its weakness lies in its inability to secure the full collaboration of the peoples of India and of all the Colonies. It is significant that it has obtained full collaboration where there are full democratic institutions (except in Eire, which is the exception which proves every rule). Democracy may often be inefficient and may sometimes be corrupt: but it associates the people with its government in a way in which no other system can do. It makes them responsible because they feel that they are responsible. When the Blitz came to London the Londoners did not

consider that it was an attack upon the Government; they thought that it was an attack upon them, an attack which they themselves must resist. The war was a war of the people, by the people, for the people. We lawyers are right to insist on the importance of an impartial judiciary, the value of habeas corpus, the (possibly) even greater importance of our ordinary civil remedies and our orders in the nature of writs of mandamus, prohibition and certiorari, the necessity for having laws clearly defined, the fundamental nature of the liberties of free elections, free speech and free association; but we must confess that these are but incidentals and that the primary need is to create such an atmosphere that the ordinary citizen speaks not only of his country but also of his Government.

THE BRITISH CONSTITUTION

§ 1. *The Functions of Government*

THE DIVISION OF LABOUR

IN the progress of the Teutonic peoples from the primitive tribal system described by Tacitus to the highly complex organisation of to-day, the individual has come to be more and more dependent on his fellows. The hunter of the wandering tribe provided food, clothing, fuel, weapons, and shelter for himself and his family, and the tribe as a whole was concerned only with organised defence and aggression and with a primitive kind of justice based on its customary laws. To-day, the individual is but a unit in a vast system of production and distribution whose limits are fixed (perhaps only temporarily) by the stratosphere. He takes a small part in the economic process. He sells his labour in order to purchase the commodities that he needs; and both the variety of the commodities and the extent of his needs have enormously increased. Modern industrial civilisation is based essentially on the division of labour.

The settled communities, also, lost their tribal character. The unit of society became not the tribe but the village. In course of time the specialisation of function produced towns which were economically dependent upon their hinterland until the extension of

trade broke down local self-sufficiency. There was at the same time a parallel development which had not necessarily any direct economic causes. The authority of Rome had already created an empire; and the Teutonic tribes which encroached upon its boundaries were not mere tribes, but peoples or armies. When they settled upon the land, therefore, they created principalities or kingdoms which tended towards fusion, especially in England, by succession and conquest. Thus, while the social or economic unit was the village or town, which was also the main political unit, the ultimate political unit was the kingdom.

England had become a political unit in this sense before the Norman Conquest; and while the village was the essential economic unit, it was the function of the king to provide for defence, and of the subdivisions of the kingdom, the shire and the hundred, to provide for the maintenance or order and the administration of justice. After the Conquest, and before in some places, the village became a manor in the control of a lord. The hundreds and the shires—now more often known as counties—remained, though many of the former and some of the latter fell into the hands of lords. The resulting division of authority in the localities, combined with the strength of some of the Norman and Angevin kings, created a unified political system and enabled the feudal system to be broken up much earlier than in most other countries. By the middle of the fourteenth century England had a general or common law, and the main functions of government, those relating to the agricultural economy of the manor apart, were vested in the central authorities that sur-

rounded the king and in the king's local representatives. From this time we can speak of England as a "State."

The growth of the division of labour, which became marked in England with the development of the wool trade, did not of itself imply a corresponding increase in the functions of government. Some increase there was, of necessity. A more extensive system for maintaining order, some organisation for the repair of roads and bridges, a development of the instruments for the settling of disputes and the imposition of taxation, were obviously required by the gradual breakdown of manorial self-sufficiency. Trade and commerce are, however, matters of private arrangement, and the State itself need do no more than provide the laws to regulate disputes, the judicial institutions to administer the laws, and the currency to serve as the instrument of exchange. It happens that in England the State went somewhat further, and was compelled to make some attempt to control the movement of labour. So long as labour was provided within the manor by labourers who themselves had interests in the land of the manor, the problem was one for the manor alone; but hired labour became more and more the practice as specialisation developed, in ancillary trades as well as in agriculture itself, and labourers in search of work left their manors, with the result that the State interfered in the interests of public order and the needs of employers. Justices of labour were created to regulate labour, and were subsequently merged with the justices of the peace, who were originally concerned only with the apprehension of criminals.

By the sixteenth century the State had to concern itself far more than in the past with external relations, and at the same time it had not only to deal internally with "wandering beggars" who were "rogues and vagabonds," but also to provide poor relief; and the requirements of transport compelled more effective provision for the maintenance of roads and bridges. Nor did the constitutional difficulties of the seventeenth century substantially obstruct economic developments. De Tocqueville has pointed out that the English Revolution was not a great social and economic upheaval like the French Revolution, but a mere dispute as to ultimate control of governmental power. The result of further economic development was that in the eighteenth century the State had the additional functions relating to the regulation of prices, the regulation of foreign trade, and the government of colonies. Moreover, though the foundation of the nation's economic life remained in the village, the towns became increasingly important.

THE INDUSTRIAL REVOLUTION

THE Industrial Revolution—falsely so named, because there was no clear break in the chain of development, and the use of steam-power merely accelerated the speed of change—altered the emphasis. Mining, iron smelting, and other industries became as important as agriculture. The domestic wool industry was superseded by weaving factories, and foreign trade developed the cotton industry. New methods of transport were developed. These changes did not in themselves require any new functions of government; indeed, the

ideas of the time, especially after Adam Smith, were in favour of easing such governmental restrictions on trade and industry as already existed and the development of a system of free competition. There were, however, repercussions in the field of government. New roads, canals, and, in due course, railways were required. New ports and harbours were opened. Though some or all of these might be provided by private enterprise, the intervention of the State was necessary to enable land to be acquired, traffic to be regulated, roads crossed, bridges built, and so on.

The most important effect from a governmental aspect, however, was the congregation of vast numbers of inhabitants into towns, some of which were ancient market towns, some mere villages, and some entirely new growths where before agriculture had reigned supreme. The old methods by which the family had obtained its own water and disposed of its own sewage and refuse were dangerous to health in these great urban centres. New police forces had to be created, streets paved and lighted, refuse collected, and water supplies and main drainage provided. The existence of unemployment on a large scale created a new problem for the poor law. In particular it was recognised that ill-health was responsible for much unemployment and, therefore, for much expenditure on poor relief. On the one hand medical services and hospitals had to be provided, and on the other hand there was new agitation for preventive remedies—pure water, clean streets, good sewerage, and sewage disposal. Also, these remedies were not enough if a large part of the population spent most of its time in unhealthy fac-

tories and mines. Hours and other conditions of employment had to be regulated; and though this involved in the earlier experiments only restrictions on private enterprise, they were soon found to be ineffective without State inspection.

Thus, while the State in the nineteenth century was freeing trade from the cumbersome restrictions of the eighteenth century, it proceeded to regulate industry both directly in the interests of public health and indirectly by providing services out of the produce of taxation. After 1870 sections of the working class had the vote, and the individualist principles which appealed to the middle class of the industrial towns became much less strong. Accordingly, the provision of services became part of State policy. It recognised, for instance, its responsibility for the education of the young and provided schools, not merely by subsidising ecclesiastical bodies, as it had done since 1833, nor merely for the benefit of "pauper children," but directly through the local authorities and for the benefit of all children. There was, too, a general and progressive reform of all the public services, and new services, such as housing, transport, and electricity, were provided. In the present century the pace of development has accelerated; and while on the one hand existing services have been expanded, new services like pensions, insurance, and broadcasting have developed.¹

¹ The expenditure on "social services" alone increased from £20,100,000 in 1891 to £55,100,000 in 1911, and to £426,800,000 in 1935.

§ 2. *The Separation of Governmental Functions*

NO WRITTEN CONSTITUTION

At some stage in the history of most nations there arises the need for a formal determination of the composition and functions of the main instruments of government. Possibly order has to be produced out of the chaos created by a great social revolution; or the nation throws off the yoke of a foreign conqueror or is in some way separated from its roots; or a nation is created by the fusion of smaller political units. There are many ways of creating a new State or reorganising the political complexion of an old one; but whatever the circumstances the need is felt, and some person or body of persons is set to draft a constitution.

Such a need arose in England in 1653, when Parliament, having created an army to destroy a king, was itself destroyed by its own child. Government by an army is perfectly possible, but it is usually a temporary phase; and Cromwell was too honest a man and too politic a dictator not to see that a more permanent system of government was required. The *Instrument of Government*, which made Cromwell Lord Protector and established a new legislature, was, however, the British Constitution for a few years only, and hardly survived Cromwell himself. In 1660 Charles II, the king across the water, came into his own again and proceeded to reign almost as if the Commonwealth had never existed.

With this exception, England has never had a written constitution. The United Kingdom of Great Britain was formed by extending some English institutions to Scotland and in other respects leaving Scottish insti-

tutions intact. The United Kingdom of Great Britain and Ireland was formed by applying British institutions to Ireland. Northern Ireland received a constitution in 1920 by Act of the United Kingdom Parliament. The Irish Free State was established in 1921 by mutual agreement. Great Britain has no written constitution. The institutions necessary for the exercise of the multifarious functions of the modern State have been established from time to time as the need arose. Formed to meet immediate requirements, they were then adapted to exercise more extensive and sometimes different functions. From time to time political and economic circumstances have called for reforms. There has been a constant process of invention, reform, and amended distribution of powers. The building has been constantly added to, patched, and partially reconstructed, so that it has been renewed from century to century; but it has never been razed to the ground and rebuilt on new foundations. If a constitution consists of institutions and not of the paper that describes them, the British Constitution has not been made but has grown—and there is no paper.

BRITISH EXPERIENCE

IN the process of constitutional development England first and Great Britain afterwards have led the way. Written constitutions are based on theories or principles of government; but theories are suggested by experience, and the nations who dare to call themselves free have built largely on British experience. British constitutional history shows a constant process of experimentation as institutions have been developed

and modified to meet the needs of a changing civilisation.

Political institutions are commonly divided into three groups, the legislature, the executive or administration, and the judiciary. The distinction was not unknown to ancient political theory; it can be found in Aristotle.¹ It was, however, not political theory but political experience, the logic or accident of events, which caused England to develop this threefold division; and the theory which caused it to spread among the free nations and among the nations that would be free was based upon English history. It was produced by a partial synthesis of that history and an examination of the more important of its consequences.

Certainly the division was unknown to feudal England. The logic of the feudal system gave the government of a manor to a lord who, for this purpose, maintained a "court." The lord was tenant or vassal of a superior lord and was governed in that lord's court; above that lord was another lord; and so on, until at length one arrived at the king, who was perhaps regarded as the vassal of that elusive person, the successor of the Roman emperors. No country was completely feudalised, so that this beautiful and symmetrical pyramid never existed and was the product of the lawyers' logical minds. In one sense, however, England was completely feudalised, for after the Norman Conquest it was assumed that every "parcel" of land was in a manor and was held either by the king or by a mesne lord who held as vassal directly or indirectly from the king. There was, however, no hierarchy of

courts. The Norman kings maintained also "the laws of Edward the Confessor," which meant that, for Englishmen at least—and in due course even the Normans became English—there was in existence the system of Anglo-Saxon moots, the county and hundred courts; and through the royal officers called sheriffs the kings retained and exercised the powers necessary for maintaining order. Many hundred courts and a few county courts fell into the hands of lords; but generally there was nothing between the manorial courts and the king's own court; and by the side of the manorial courts were the hundred and county courts. Also, though the king's court was a feudal court, it did not consist only of great lords, but included also persons whom we should call officers of state, landless men, professional careerists in the king's service; it did not deal only with disputes between great vassals, because it also controlled the sheriffs and through them maintained order and collected the king's revenues.

THE COURTS

REFORMS of Henry I and Henry II strengthened and expanded their powers. The manorial jurisdiction as a whole was limited and weakened by the existence of the other local courts and by the direct control over the sheriffs. Consequently the king's court under Henry II was quite unlike a feudal court. It exercised a general control over the whole country, especially in matters of revenue and criminal justice, and the king's writ ran nearly everywhere. It contained professional administrators, the king's justices and the barons of the Exchequer especially, who tended to become pro-

fessional lawyers, who developed a general or "common" law for the whole country, and some of whom went round the country from time to time to control local administration under the king's commission and in the king's name. The feudal reaction in Magna Carta was partial only, and that document contained clauses which to a new generation and in a new age meant something far different from what they intended to say, and which came to be regarded as the foundation not of the "liberties" of lords, but of the liberties of the people.

The justices and the barons were inferior administrators who dealt primarily with matters which were covered by practice or precedent and which could be reduced to rules or, as we should say, law. Matters of political importance were determined by the king in his court or, as it must now be called, his council; and the Courts of Common Pleas, Exchequer, King's Bench, and Chancery gradually separated from this council to form the first set of specialised institutions, the courts of law and equity, or judiciary. They were, however, mere subordinates or delegates of the council; they were subject to control by the council; and the judges and the barons rendered assistance in council. The courts had become separate institutions because of the great increase in the work of the council, the comparative unimportance of their functions, and the amount of technical knowledge required.

PARLIAMENT

EDWARD I followed the example of Simon de Montfort by summoning to his council for the purpose of supplying information and consenting to the levy of

taxation representatives of the counties and boroughs or "commons." After 1295 the representation was in principle always the same—two knights from each shire and two burgesses from each borough. There was already a tendency for a distinction to be drawn between the ordinary council (or Privy Council, as later generations called it) and the Great Council, to which were summoned not only the royal officers but also the archbishops, bishops, abbots, earls, and greater barons prescribed by Magna Carta for the levying of aids. The earls and barons tended to be determined by hereditary title, and the Great Council consisted of "lords spiritual and temporal," including the royal officers. When the king summoned also the representatives of the commons, he was said to hold a council in Parliament. In practice, however, the lords and the commons deliberated separately, and Parliament thus came to consist of the House of Lords and the House of Commons.

The great statutes of Henry II and Edward I were made by the king in council. At a later stage, legislation was often enacted at the request of the Commons; the Commons sent up a petition or "Bill" requesting the making of a law, the judges drafted it, and it was approved in council. Under the Lancastrian kings the Commons became more aggressive. They insisted on their privilege of free debate, they claimed the right to be consulted on all matters of taxation, they sent up their "Bills" in the form in which they wished to have them enacted, and they insisted that the Act should not diverge from the Bill without their consent.

THE COUNCIL AND THE COURTS

THE Wars of the Roses destroyed the supremacy of the council. When it was re-established by Henry VII it was no longer the governing body of the nation, but was concerned primarily with the restoration of order and the punishment of offenders against the laws, new and old, though it continued to control the courts as the council had always done. It was especially concerned with the control of the justices of the peace, who were primarily responsible for the maintenance of order. They had been established by Edward II to provide a means more effective than the sheriff for the apprehension of criminals. As a result of the development of the practice of employing hired labour, and particularly because of the scarcity of labour produced by the Black Death, justices of labour were appointed to restrict the movement of labourers. Later, the justices of labour were combined with the justices of the peace, and from time to time additional functions were conferred upon them. By the time of Henry VII the manorial system had almost completely broken down, and the justices of the peace were the people who, subject to the control of the council and the judges of assize, really governed the country outside the towns. They not only apprehended criminals and controlled the high and petty constables, but also secured the maintenance of roads and bridges and punished offenders. Later legislation under the Tudors placed them in control of the new poor law.

The functions of the council under Henry VII were

largely technical and were generally exercised by a kind of sub-committee sitting in the Star Chamber, which became known as the Court of Star Chamber. Though a useful body under the Tudors, it became an instrument of tyranny under the Stuarts, who used it to enforce the new and oppressive ordinances which they issued without the consent of Parliament. It was, especially, the chief instrument of Charles I during the "eleven years' tyranny" between 1629 and 1640, when Charles tried to rule without Parliament. One of the first acts of the Long Parliament in 1641 was to sweep away the Court of Star Chamber and the whole controlling jurisdiction of the council.

This act had the result not only of freeing the superior courts from formal control, but also of giving the justices of the peace a free hand. The justices could be kept within their legal powers by writs issued by the king through the Court of King's Bench, but henceforth they were entirely free from administrative control, not only in respect of the trial of offences but also in respect of the maintenance of roads and bridges, the relief of the poor, and (later on) the regulation of ale-houses and prices of commodities. These discretionary functions became more and more important as the rapid expansion of trade which began with the Tudors fundamentally modified the social structure of England. Yet still the justices were primarily judges, and a rough classification would place them among the "judiciary." The superior courts, also, became free from formal control except in Parliament. This control was exercised by the House of Lords and resulted in a system of appeal, so that that House became the highest

of the civil courts, a part of the judiciary as well as a part of the legislature.

The judges were still royal servants, and as they had always been members of the council they were summoned to the House of Lords. Their position in Parliament was, however, gradually depressed to that of assistants, and they did not, and do not, attend except when asked by the House of Lords to express opinions on points of law. As royal servants, they were dismissible at the king's pleasure, and the dismissal of Sir Edward Coke, chief justice of the King's Bench (and one of the ablest politicians to sit in court), by James I showed that the power might be exercised if they rendered decisions which were unfavourable to the king. Whether they were in fact subservient to the king for this reason in the Stuart period is arguable; but at least Parliament thought so, and it was ultimately provided by the Act of Settlement in 1701 that they should in future hold their commissions during good behaviour, but should be dismissible on address from both Houses of Parliament. This provision did not apply to the justices of the peace, and they were often removed from the commission for political reasons during the course of the eighteenth century. Nor has the provision been completely extended to the judges of the county courts established during the nineteenth century. The independent tradition of the superior courts has, however, been copied by the lower courts.

KING AND PARLIAMENT

THE relations between king and Parliament were still unsettled at the beginning of the seventeenth century.

Most of the Tudors legislated without the consent of Parliament, though Henry VIII carried out all his great reforms with the assistance of his servile Parliaments. James I and Charles I not only legislated but even levied taxation without Parliamentary sanction. Legally, the kings had a better case than most of the Whig historians are prepared to allow; and if a choice must be made between Bacon and Coke it would be wise to rely on Bacon. The events of the reign of Charles I showed, however, that the questions at issue could be settled only by revolution, and in the process one Stuart lost his head and another his throne. The principle implicit in the Bill of Rights of 1689 is the supremacy of Parliament.

William and Mary owed their throne to Parliament. Yet Parliament did not yet presume to control administration. One result of the Commonwealth had been to reaffirm the monarchical principle. Indeed, so long as a large section of the Tories asserted that Parliament could not lawfully change the succession, and that whatever the Bill of Rights said, the son or the grandson of James II was king, it was not possible for any substantial republican movement to develop. Kingship in this period implied the exercise of substantial powers. The monarch conducted foreign affairs, made war and peace, and governed the colonies. The Bill of Rights, seeking to carry into law one of the lessons of the Commonwealth, made a standing army illegal; but so long as there was a rival king across the water, a disaffected minority in England, and a disaffected majority in Scotland, it was not possible to dispense with a standing army. Accordingly, Parliament renewed the

Mutiny Bill from year to year, hoping that each year was the last, until it was discovered, first, that it was quite impossible to dispense with a standing army, secondly, that that army was essentially under the control of Parliament, and thirdly, that if the Mutiny Bill was to be passed every year there must be a Parliament every year.

CABINET GOVERNMENT

~~THE~~ growing burden of State functions compelled the monarch to rely heavily upon ministers. The Privy Council as an effective instrument of government had not survived the Commonwealth; but the principal officers of state, the Lord Treasurer, the Lord Chancellor, the Lord President of the Council, the Lord Privy Seal, and the Secretary of State, advised the king and exercised powers on his behalf. The king was still, in fact as well as in form, Commander-in-Chief of the army, and controlled the navy through the Lord High Admiral, who was generally a member of the royal family. His dependence on Parliament for supplies and for the passing of the Mutiny Bill compelled him, however, to consider and often to give way to opinions expressed in Parliament; and the impeachment of Clarendon and Danby showed that ministers must tread warily lest they suffer from Parliamentary displeasure. On the other hand, the ministers were often able to keep Parliament favourable to their—or the king's—policy, partly because of their “connection” or party support, and partly because members were not incorruptible and the process of corruption

begun under Charles II had been developed with remarkable efficiency.

Thus the constitution after the Act of Settlement could be described as a "mixed" or "balanced" constitution. The supremacy lay in Parliament, but national policy was determined by the king subject to certain controlling powers of Parliament. Laws were made in Parliament and administered by the superior courts and the justices of the peace; and the superior courts were free from royal control, while the justices of the peace in practice were uncontrolled. The growth of trade and industry was giving the justices of the peace more important functions. Moreover, the towns were becoming more important as trade developed. Most of them were governed by corporations under ancient charters; and though they had been subjected to interference under the Stuarts, they were substantially uncontrolled after the Bill of Rights.

§ 3. *The Separation of Powers in Theory*

DIVISION IN PRACTICE

THE functions of government after the Act of Settlement were thus divided among five groups of institutions:

(1) The king and his ministers, who controlled the navy and the army, carried on external relations, and levied taxation, but who were in some degree dependent upon Parliament;

(2) Parliament, which alone had power to pass legislation, to authorise the imposition of taxation, and to validate from year to year the maintenance of the army, and which had ultimate control over ministers through the power of impeachment;

(3) The superior courts, which were independent of the Crown, but were subject to the legislative control of Parliament, and of which the highest tribunal was the House of Lords itself;

(4) The justices of the peace, who were primarily responsible for the maintenance of the peace, but who also controlled the provision of poor relief, the maintenance and operation of the rudimentary police system, the maintenance of roads and bridges, and the regulation of prices (though this last function was less important than it looks), and who were controlled only by the superior courts and by legislation;

(5) The corporations of towns, who provided urban services in a few places, and who effectively were not controlled at all.

If the important or "political" functions of government alone were considered, emphasis would naturally be placed on the first three groups of institutions only. Moreover, the functions of the justices of the peace and of the corporations were exercised, at least technically, under commissions and charters issued by the Crown. Alternatively, the justices of the peace might be treated as part of the judiciary; they followed much the same procedure as the superior courts, even in respect of their "administrative" functions. For instance, the maintenance of roads and bridges was provided for by indicting the person or body of persons (which might be a parish or a county) for failing to carry out the duty of repair; a person who thought that he was entitled to poor relief and did not get it summoned the overseers of the parish before the justices; and so on. Thus the functions of government might be said to fall into three

groups according to a classification which was not essentially different from that referred to by Aristotle.

DIVISION IN THEORY

THEORY, as usual, followed upon fact. John Locke, the apologist of the Revolution of 1688, justified the supremacy of the legislative power, but considered that, because the legislature was not permanently in session, and because legislators might exempt themselves from obedience to their own laws, legislation and the execution of the laws were in distinct hands "in all well-moderated monarchies and well-framed governments." By the executive Locke meant primarily what we should call the judiciary; but he recognised a third kind of function, which he called the "federative" and which involved the carrying on of external relations.¹

Other English writers of the eighteenth century extolled the "mixed" or "balanced" English Constitution. It was, however, Montesquieu who raised "to the rank of new and universal constitutional principle" the doctrine of the separation of powers "by maintaining that it was to this separation of the powers of government that the English people owed their liberty."² That England had far more liberty than most other countries in 1732, when Montesquieu was in England, or in 1748, when *L'Esprit des Loïs* was published, cannot be doubted. Montesquieu was con-

¹ John Locke, *Two Treatises of Government* (1690), Vol. II, Ch. XII. See also H. R. G. Greaves, "Locke and the Separation of Powers," *Politica*, Vol. I, pp. 90-112.

² Report of the Committee on Ministers' Powers (1932), Cmd. 4060, p. 8.

cerned to combat despotism of the kind which Louis XIV had established in France. It might be said, of course, that England had overthrown despotism by beheading one incipient despot and dethroning another, and by vesting supreme power in a representative assembly (for Parliament was more truly representative early in the eighteenth century than it was a hundred years later, when the Industrial Revolution had profoundly modified both the distribution of population and the distribution of economic power). But Montesquieu carried the analysis much further. "In every State there are three kinds of powers," he said,¹ "the legislative power, the power executing the matters falling within the law of nations, and the power executing the matters which fall within the civil law. Through the first, the Prince or Magistrate makes the laws for the time being or for all time, and amends or repeals those previously made. Through the second he makes war and peace, sends and receives ambassadors, establishes order, prevents invasions. Through the third he punishes crimes and judges the disputes of private individuals. This last is called the Judicial Power, and the second is known as the Executive Power."

This famous chapter is headed "On the Constitution of England"; and the passage quoted is a generalisation from English experience. He went on to show that this division of powers is essential for liberty:

"When the Legislative Power is united with the Executive Power in the same person or body of magistrates, there is no liberty because it is to be feared that the same Monarch or

¹ *L'Esprit des Lois*, Book XI, Ch. VI (2nd ed., 1749, Vol. I, p. 219).

the same Senate will make tyrannical laws in order to execute them tyrannically. There is again no liberty if the Judicial Power is not separated from the Legislative Power and from the Executive Power. If it were joined with the Legislative Power, the power over the life and liberty of citizens would be arbitrary, because the Judge would be Legislator. If it were joined to the Executive Power, the Judge would have the strength of an oppressor. All would be lost if the same man, or the same body of chief citizens, or the nobility, or the people, exercised these three powers, that of making laws, that of executing public decisions, and that of judging the crimes or the disputes of private persons.”¹

It is not quite clear what Montesquieu intended to include within his three groups of functions. He made no nice analysis of governmental powers. Certainly his classification did not fit exactly the British Constitution as he knew it. Order was established as much by the justices of the peace as by the army, yet the justices judged crimes. He did not mention the other powers of the justices, nor the taxing power, which was in part exercised by the Commissioners of Customs and of Excise, and in part by the justices, nor the Post Office. The vast new powers conferred upon public authorities during the last two centuries cannot be fitted into the classification.

Nor was the separation completely marked in the eighteenth-century constitution. The growth of ministerial responsibility had not at that stage proceeded far, and it would not be obvious to a foreigner not very conversant with then very recent English history. The highest court, the House of Lords, was and is a part of Parliament. The Lord Chancellor was

¹ *L'Esprit des Lois*, Book XI, Ch. VI (2nd ed., Vol. I, p. 220).

at once the president of the House of Lords, a chief adviser of the king, and a judge, and the other judges were summoned to the House of Lords. The king no longer controlled the courts, but he was still an essential party to legislation.

Some at least of these facts were certainly known to Montesquieu. He was not concerned to make a precise analysis of the functions of government. He was, rather, trying to find the means by which tyranny could be avoided, and, naturally, he turned to the country where the battle against despotism had been fought and won and where liberty existed in a far greater measure than in his own country. As Madison said :

“It may clearly be inferred that, in saying ‘There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates,’ or ‘if the power of judging be not separated from the legislative and executive powers,’ he did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye (i.e. England), can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power in another department, the fundamental principles of a free constitution are subverted.”¹

In other words, liberty and dictatorship are incompatible; and there is nothing in the experience of other nations to lead us to suspect that Montesquieu on this point was wrong. On the other hand, we must not assume that a separation of powers in itself is the

¹ The *Federalist*, No. XLVII.

foundation of liberty, or, to put it in another way, that tyranny cannot exist where there is separation of powers. There is a particular danger where the legislature is supreme and a representative government has a majority in both Houses of Parliament. The reaction to the French Revolution produced in England a tyranny as great as that of Charles I, and the remedy was found not in a more precise separation of powers, but, at first, in the refusal of many people (including members of juries) to obey the law, and, at a later stage, in the extension of the franchise. It is democracy and not merely the separation of powers that keeps Britain free.

ANALYSIS OF FUNCTIONS

STILL less must it be assumed that it is possible to distinguish by analysis "legislative," "executive," and "judicial" powers. Montesquieu made no nice distinctions, and none of his successors has been successful in drawing them. It is accepted by a large body of expert opinion that they cannot be drawn. There are characteristics of various classes of functions which make it desirable that they should, for instance, be exercised by independent judges; but there is no single characteristic or group of characteristics which enables the legislature to determine out of hand that a particular function should be assigned to judges or, in other words, which distinguishes the "judicial" class of functions. Similarly, it is thought sometimes that "general" laws should be made by the legislature and at other times that they should be made by other authorities; and there are individual decisions which

ought, it is considered, to be taken by the legislature itself and not by other authorities.¹ It is necessary to have at least the three classes of authorities, but they are distinguished rather by their composition and their methods than by characteristics of their functions.²

APPLICATIONS OF THE THEORY

THE different ways in which Montesquieu's principle may be interpreted and applied in practice is shown by the subsequent history of the three great democracies of Great Britain, the United States, and France. If a political principle which has some basis in reason receives general acceptance and can be formulated in a neat phrase, it becomes a reason in itself, its original justification is forgotten, and it is used for purposes for which it was never intended. In England it appears that the doctrine of the separation of powers has not been used to prevent the development of closer relations between Cabinet and Parliament, for Queen Victoria's objections to the extension of Parliamentary control over foreign and colonial affairs and over the army were based on the threat to the royal prerogative and not on the separation of powers. On the other hand, it has been used to criticise the granting to

¹ See Appendix I.

² The theorists therefore separate the *formal* doctrine of the separation of powers from the *material* doctrine. Under the former, a function is considered to be "judicial" because it is exercised by judges; while under the latter it is exercised by judges because it belongs to the class of "judicial" functions. See, on the one side, Carré de Malberg, *Théorie Générale de l'Etat*, Vol. I, pp. 691 *et seq.*; and on the other side, Bonnard, *Le Contrôle Juridictionnel de l'Administration*, pp. 9 *et seq.* And see Appendix I.

ministers of powers to issue rules, regulations, and orders (though not, apparently, to criticise the granting to judges of powers to make rules of court), and to decide certain kinds of disputes. It has also been used to maintain the independence of the judges.

In the United States of America, however, it was used to prevent the President from having powers of control over the Congress. The American colonies experienced the consequences of the worst kind of Cabinet government. George III, having decided to restore to the monarch powers which George I and George II had allowed their ministers to exercise, and having found willing instruments in Lord North and the Tories, carried to extreme lengths the methods of corruption which had first been used by the ministers of Charles II and developed by Sir Robert Walpole and the Whigs. In the process, the American colonies were alienated and the United States of America were established. Their statesmen placed great faith in the doctrine of the separation of powers. It was embodied in the constitutions of several of the States, and it was implicit in the Constitution of the United States, though it was not explicitly mentioned. As in the British Constitution, there were checks and balances, and Madison felt called upon to defend the draft constitution against those who objected that the various powers of control offended against the principle of the separation of powers:

“No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded. The accumulation of all powers, legislative,

executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.”¹

But he went on to show that checks and balances were not contrary to the principle. As the constitution developed, the greatest of these checks and balances was the Supreme Court of the United States, which, under the inspiration of Chief Justice Marshall, assumed to itself the power of declaring invalid not only the acts of the President, but also the acts of the Congress itself, on the ground that they offended against the constitution.

In France, the theory has had evident effects upon several of the constitutions since 1789. Its most interesting effect, however, was to prevent the judiciary from declaring invalid not merely the acts of the legislature, but even the acts of the administration, or even to give remedies in respect of wrongful acts committed by the administration. How can there be separation of powers if the judges can declare administrative acts to be null and void or to give damages to persons injured through administrative acts? In truth, the rule that civil tribunals could not question administrative acts was older than the Revolution and older even than Montesquieu.² But the Revolution proclaimed the separation of powers, and the Constitution of 22 frimaire, Year VIII (1799), and the administrative reorganisation of 28 pluviôse, Year VIII (1800), applied

¹ The *Federalist*, No. XLVII.

² A. de Tocqueville, *L'Ancien Régime et la Révolution*, Book II, Ch. IV. It dates from the beginning of the seventeenth century.

it to separate the administrative and judicial powers. This resulted in the development of special administrative tribunals and the special position of French administrative law.¹

Thus, in Britain the separation of powers was maintained and yet enabled Parliament to be supreme and the courts, subject to Parliament, to give remedies against administrative authorities. In the United States the same doctrine was maintained, and therefore separated the executive from the legislature and yet enabled the Supreme Court to declare invalid acts of the legislature. In France the legislature has become supreme but has not enabled the civil courts to control the legality either of legislative or of administrative acts.

§ 4. *The Modern Constitution*

NEW FUNCTIONS OF GOVERNMENT

THE list of functions specifically mentioned by Montesquieu is significant: the making and repealing of laws, the making of war and peace, the sending and reception of ambassadors, the maintenance of order, the prevention of invasions, the punishment of crimes, and the determination of private disputes—these were the essential functions of government in the eighteenth century, and they must always be the most important of those performed by the State. There were others, the solitary “social service” of the poor law, the maintenance and repair of roads and bridges, and the regulation of ale-houses and prices. In the main, these

¹ *Post*, pp. 208–18.

were the product of the development of trade; and many more were to be added as the Industrial Revolution altered the economy of Britain and shifted the emphasis of her institutions of government.

Most of these changes took place while responsible Governments sat in Westminster. George III made an attempt to restore to the monarchy the functions which ministers had tended to exercise under his two Hanoverian predecessors, and for this purpose developed the corrupt methods of Sir Robert Walpole. The return of the Whigs in 1782, however, struck the first blows against government by favouritism and corruption. Though the king rid himself of the zealous reformers in 1783 and brought in the younger Pitt in spite of the derisive laughter of the majority of the House of Commons, the old system was never fully restored. Pitt was first minister as Walpole had never been. He had enough strength of character to resist the king and enough diplomacy not to resist him too far. Though the reaction caused by the French Revolution and the French wars put back reform for a generation, there was a progressive development of Cabinet government from 1782 to the accession of Queen Victoria. Charles James Fox (the first statesman who could really be called the Leader of the Opposition) and Charles Grey fought a gallant rearguard action against hopeless odds until the tide turned, and Lord Grey found himself in office with a majority large enough, and a monarch both liberal and weak enough, to enable him to overcome the opposition of the House of Lords. Henceforth, no matter what Queen Victoria said, the Government was in the hands of the Cabinet, whose power

rested on the support of the House of Commons and the electorate.

LOCAL GOVERNMENT

THE powers of government expanded and new institutions were created after 1832 primarily in the field of local government. The accession of the Whigs in 1830 and the passing of the Reform Bill in 1832 were due to the rise of the new urban middle class and the development of the towns. The conversion of the municipal corporations into democratically elected bodies in 1835 was due to the same cause. The main problems of the new age lay in the towns. Scores of unnamed reformers, some seeking profits and some amenities, had promoted Bills to establish improvement commissioners, sewerage and paving commissioners, water companies, turnpike trustees, and the like. General legislation from 1833 onwards, passed often without debate and at other times with only insipid comment, created modern local government, until by the end of the century the justices of the peace were concerned almost wholly with the administration of criminal justice, and borough councils, county councils, urban and rural district councils, parish councils, and public utility corporations of all kinds were exercising functions which were almost unknown in the middle of the eighteenth century.¹

CENTRAL GOVERNMENT

THE expansion of the central government was slower but no less inevitable as the industrial system and, with

¹ For a survey of the development of local government, see Jennings, *Principles of Local Government Law*, Ch. I; and see *A Century of Municipal Reform* (ed. Laski, Jennings, and Robson).

it, the population developed by geometrical progression. The Board of Trade lost some of its functions as free trade replaced mercantilism, but it gained others through the control of public utilities like canals, ports and harbours, railways, tramways, gas, and electricity. One of the Secretaries of State (and there are now eight of them, for the French wars were followed by a rapid creation of a new British Empire) was restricted to Home Affairs and became responsible for supervision of the new police forces and the control of factory conditions. The Poor Law Commissioners (1834-47), the Poor Law Board (1847-71), the General Board of Health (1848-58), and the new health powers of the Privy Council, paved the way for the Local Government Board (1871), which became the Ministry of Health in 1919. The Privy Council also received functions in respect of education which were transferred to the new Board of Education in 1899. The Board of Agriculture (1892) became the Ministry of Agriculture and Fisheries in 1919.

During the nineteenth century the social services developed within the framework of local government, though central authorities were created to control and assist the local authorities. In the present century many such services have been developed directly by the central government, especially in respect of State insurance and pensions schemes. Moreover, since sections of the working class obtained the franchise in 1870, and especially since the return of the Liberal Government in 1906, the progressive intervention of the State has produced a highly complex administrative scheme, in part under the control of ministers, but

in part also through independent bodies like the Central Electricity Board, the British Broadcasting Corporation, and the London Passenger Transport Board.¹

This vast development could not have been foreseen by those who analysed the British Constitution in the middle of the eighteenth century. It cannot be fitted into the doctrine of the separation of powers as Locke or Montesquieu formulated it, and the traditional classification of functions breaks down through the creation of new and diverse functions. The development was in part unknown and, so far as it was known, its importance not adequately appreciated, even by the jurists of the nineteenth century; and this is especially true of those jurists who, like Dicey,² thought in terms of the classical constitutions of the Revolutionary era. British political institutions are no longer concerned only with external relations, the maintenance of order, and the administration of justice; they closely regulate private enterprise and provide vast services directly to the citizens. The balance of the constitution has shifted.

§ 5. *The "Unwritten" Constitution*

MEANING OF "CONSTITUTION"

THE word "constitution" may be used in two different though closely related senses. In the first and more precise sense it means the document in which are set out the rules governing the composition, powers, and

See Jennings, *Cabinet Government*, Ch. IV and Appendix III.

² *Law of the Constitution* (1st ed., 1885; 8th ed., 1914); but see Dicey's *Law and Opinion in England* (1st ed., 1905; 2nd ed., 1914), where account is taken of the developments of the late nineteenth century.

methods of operation of the main institutions of government, and the general principles applicable to their relations to the citizens. Thus, the latest and nearest example, the Constitution of Eire (Ireland),¹ deals with the following matters:

- (1) The Irish nation and territory;
- (2) The character of the State, its flag, language, and citizens;
- (3) The President, the character of his office, the method of election, his responsibility to the legislature, and his powers;
- (4) The Parliament, its composition, powers, and methods of legislation, the reference of legislation to the Supreme Court, the referendum in case of disagreement between the two Houses;
- (5) The Government, its composition and appointment, and its relations to Parliament;
- (6) The Attorney-General, his appointment and powers²;
- (7) The Council of State, its composition and functions;
- (8) The Comptroller and Auditor-General, his appointment and functions;
- (9) The courts, their composition and functions;
- (10) The trial of offences, general principles, including the functions of special and military courts;

¹ "The name of the State is Eire, or, in the English language, Ireland": art. 4. But at present the laws enacted by the Parliament (and therefore in fact the Constitution) extend only to that part of Ireland which is not included in the United Kingdom: see art. 3. For simplicity of exposition, the names "Ireland" and "Irish" are retained in this book.

² The Attorney-General is not a member of the Government.

- (11) Fundamental rights of citizens;
- (12) Directive principles of social policy (intended for the guidance of the Parliament);
- (13) Amendments of the Constitution;
- (14) Repeal of the Constitution of 1921 (as amended) and continuance of the laws of Ireland under the new Constitution;
- (15) Transitory provisions.

This is a very complex and detailed constitution, containing 63 articles and occupying 58 printed pages. The Constitution of the United States of America contains only seven (though longer) articles, and occupies about ten pages. The difference is in itself suggestive, for it shows that, within limits, a written constitution may contain as much, or as little, as is thought desirable. It is a framework, a skeleton, which has to be filled out with detailed rules and practices. It is concerned with the principal institutions and their main functions, and with the rights and duties of citizens which are, for the time being, regarded as important. It may contain more or less, according to the circumstances of the moment and the special problems being faced by the State while it is being drafted.

For instance, the Irish Constitution deals with the flag, the Attorney-General, the Comptroller and Auditor-General, and certain principles relating to the trial of offences. It contains also an unusual feature (though not essentially dissimilar from provisions sometimes inserted as "fundamental rights"), "directive principles of social policy," which are "intended for the general guidance of the Oireachtas (i.e. Parlia-

ment).” All these are put in because it seemed desirable to those who drafted the constitution and to those who approved it. If there had been nothing in it about the flag, the Attorney-General, and the Comptroller and Auditor-General, it is probable that they would have been provided for by legislation. On the other hand, it says nothing about local government, or the supply of gas, water, and electricity, or unemployment insurance, or the details of the criminal law. Some might say that these matters are of more importance than the flag or the language; yet the Government and the Dail of the Irish Free State evidently thought that they were not, or, if they were, that the rules relating to them varied so much from time to time that they ought not to be set out formally in an instrument which cannot be changed so easily as ordinary legislation.

GREAT BRITAIN

APART from the experiments of the Commonwealth, neither England nor Great Britain has ever had a written constitution. Have we then no constitution? It is here that the second meaning of “constitution” becomes important. If a constitution means a written document, then obviously Great Britain has no constitution. In countries where such a document exists, the word has that meaning. But the document itself merely sets out rules determining the creation and operation of Governmental institutions, and obviously Great Britain has such institutions and such rules. The phrase “British Constitution” is used to describe those rules.

It is, however, somewhat ambiguous. A written

constitution does not contain all the rules relating to all the institutions of government. A selection is made of both. For instance, though it may provide for a House of Commons consisting of members elected by constituencies, the confines of the constituencies and the detailed rules relating to elections will probably not be inserted. Also, the separate Government Departments, local authorities, and other less important political institutions will probably not be mentioned at all. The selection is made according to the importance of the institutions and rules as they appear to the framers. Having made such a selection, the document becomes fundamental law and, subject to amendments, the selection remains for all time, even if later ages consider that other institutions and rules have become of more importance.

Great Britain having no such document, there can be no authoritative choice. Usually, a writer on the British Constitution selects what seems to him to be important. Some include the Church of England, some include all the Churches, established and not established, and some include none. Some deal with the Regular Army, some add the Territorial Army, and some refer to neither. Ordinary language justifies a choice, for it is often said that an institution or rule is of "constitutional" importance. When the Constitutional Convention (significant name) was trying to secure agreement between the Liberal Government and the Conservative Opposition about the terms of the Parliament Bill after the death of Edward VII, it tried to make a distinction between "constitutional legislation," which ought to secure the approval either

of the House of Lords or of the people at a referendum, and "ordinary legislation," which might pass under the Parliament Bill with the assent of the House of Commons alone. The Conservatives wanted to include under the former a Bill conferring Home Rule on Ireland, and the Liberals did not. Accordingly, they could not agree on what the distinction was; but at least they thought that there was a distinction. This, of course, is the dilemma which confronts the makers of every constitution. Shall the right of trial by jury be inserted or not? Shall the writ of habeas corpus be included or not? Shall the Comptroller and Auditor-General be mentioned or not? Some decision on questions such as these is reached; and that decision settles the matter—what is in the constitution is "constitutional," what is not in it is not "constitutional." But where there is no such document it is quite impossible to make a distinction which is not purely personal and subjective.

The institutions of Great Britain which would be regulated by a written constitution if there were one have developed through the ages, sometimes by deliberate choice, sometimes as the resultant of political forces. The earliest of them, the courts, separated from the council merely because of the comparative unimportance and the technical nature of their work. Parliament was first summoned as an exceptional measure, then as a general practice, and finally as a matter of obligation. It first assisted, then insisted, and finally, after two revolutions, achieved supremacy. Ministers first assisted the king as clerks or secretaries, then acted on his behalf as his delegates, and finally acted

on their own behalf, consulting the king when necessary. Thus the principles governing constitutional relationships have been established primarily through the growth of practice, insisted upon, in some cases, through victory in arms; though in the more recent period legislation has been the chief instrument of development.

Some of the principles established by practice have received recognition and precision by the courts, and so have become rules of the common law. The courts have themselves determined, subject to legislation and, in the earlier period, to the overriding control of the council, the limits of their own powers. They have determined also, again subject to legislation, the rights and obligations of private persons as against the Crown and its servants and other public authorities. Whether and when a Crown servant can be sued, whether and when a policeman can arrest a private citizen, or enter his dwelling, or seize his papers, or break up a meeting—these and many other matters are regulated by the common law, subject in nearly every case to legislation.

It is, however, a very partial presentation of the facts to say, with the late Professor Dicey¹ that “the general principles of the Constitution are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts.” The most important principle, that of the supremacy of Parliament, is no doubt a rule of common law. It was not established by judicial decisions, however; it was settled by armed conflict and the Bill of Rights and the Act of Settlement. The judges did no more than acquiesce in a simple fact of political

¹ *Law of the Constitution* (8th ed.), pp. 191 *et seq*

authority, though they have never been called upon precisely to say so. Many of the most important principles of the constitution, especially those governing the mutual relationships of king, Prime Minister, Cabinet, and Parliament, have never been recognised by the courts at all. They are still constitutional practice or constitutional conventions.¹ Above all, vast changes have been effected by legislation. The council's control of the courts was removed by Act of the Long Parliament. The judges were given their independent status by the Act of Settlement. Three times since 1660 the succession to the Crown has been changed by legislation. The main limitations of the royal prerogative are to be found in the Bill of Rights. Scotland and Ireland were incorporated with England and Wales by Acts of Union. Northern Ireland was given Home Rule and Southern Ireland created a Dominion by legislation. The constitutions of all the Dominions except Newfoundland and Ireland are to be found in statutes of the Parliament of the United Kingdom, and the Constitution of Newfoundland has been suspended by similar legislation. The legislative aspects of Dominion status are determined by the Statute of Westminster, 1931. The franchise has been fundamentally altered and the distribution of constituencies profoundly modified by legislation. Practically the whole of the modern administrative system has been created by legislation.

The truth is that Dicey, as his examples show,² was

¹ See Ch. III.

² "As for example the right to personal liberty, or the right of public meeting."

concerned mainly with the principles which are inserted in many written constitutions for the protection of private rights. Since Great Britain has no written constitution, there is no special protection for "fundamental rights." So far as the rights of free speech and public meeting exist, they follow from the simple principle, common to all political systems,¹ that it is lawful to do anything which is not unlawful or which cannot be prohibited by public authorities. They are greater than in many other countries because the lawful limits are wider, and the powers of interference less numerous and extensive. But, primarily, these limits and powers must be found in legislation: and even if it were wholly a matter of common law it would still be true that they related to a part only of the constitution. Powers to control the rights of free speech, freedom of association, and freedom of assembly are undoubtedly important; with the freedom of elections these liberties are fundamental to a democratic or free constitution. They are, however, not the whole constitution.

¹ See Ch. VIII.

ENGLISH CONSTITUTIONAL LAW

§ 1. *The Rule of Law*

LAW AND ORDER

IN the course of the many discussions about the present state of international society, one phrase keeps recurring. It is said that it is necessary to establish "the rule of law" in international relations. The assertion is not that there is at present no law governing the relations of States to each other, but that international law is not obeyed. World relations, it is said, are at present governed not by law but by armed force or the kind of diplomacy which is based upon strength in arms, and the nations are constantly adding to their armaments because they believe that they can maintain or achieve what they regard as their just interests only by their own strength. If a dispute arises, it will be settled not by recourse to a court of law but simply by the chances of armed warfare. To maintain peace, and to secure that disputes shall be settled on a basis of legal rights, it is necessary to establish "the rule of law"; that is, to establish order and then to maintain peace through the settlement of disputes in accordance with law.

This method of statement expressly or impliedly draws a parallel between international society and the internal society of a modern State. The state of

international society now is much like the state of feudal society when lawless and law-abiding barons alike felt that their security rested primarily upon the number of their retainers and the impregnability of their castles. There is, however, this significant difference, that there existed a tradition from the days of the Roman Empire that the natural solution of the difficulty was the recognition of the authority of an overlord, a king or an emperor. Weaker men tended either to be conquered by their stronger neighbours or to place themselves voluntarily under their protection; and kingdoms and principalities were established in which order was maintained by the king or prince. Often there were rival claimants for the throne; faction fought with faction as in the English Wars of the Roses; and kings often fought with kings and States with States. In the main, however, the people became law-abiding; the rule of law was established.

The rule of law in this sense implies, therefore, simply the existence of public order. It does not rest entirely or even primarily upon force. From the time whereof the memory of man runneth not to the contrary, ordinary people have been content to follow the laws and customs of their fathers, to till the soil and rejoice in their families. Few have delighted in trouble, and not many have had political ambitions. The coercion of political authority is necessary for those comparatively few for whom example, precept, and the unorganised sanction of opinion are not enough. Nevertheless, if only a comparatively few lawless men are able to maraud unmolested, as in the reign of Stephen, the rule of law degenerates into anarchy;

ror then every man must defend himself or secure protection, every man fears his neighbour, and every man, therefore, like States in international society, piles up his armaments. One lawless man, like one lawless State, can destroy the peace of a substantial part of his world. Force is necessary only for the lawless and can be used only if the lawless are the exceptions. In the Middle Ages it could be used against ambitious lords. Peace and order could be established and maintained only if there was a bigger and more powerful lord who made laws for the law-abiding and courts for the settlement of their disputes, and who could descend with his armies to compel obedience by the unruly.

The natural tendency of development was thus towards absolute monarchy or dictatorship, and this tendency was observed and reinforced by political theory. Thomas Hobbes, for instance, who wrote while civil war was raging in England, considered that only the existence of a sovereign whose power was absolute and who could make laws and secure obedience to them could maintain peace and order. Where there was no law or authority, there was a "state of nature," in which "every man is enemy to every man," in which there is "no place for Industry . . . and consequently no Culture of the Earth; no Navigation; . . . no commodious Building; . . . no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall fear, and danger of violent death; And the life of man, solitary, poore, nasty, brutish and short." ¹

¹ *Leviathan*, Ch. XIII.

Though he did not assert that this state of nature had ever existed, he insisted that only authority, and sovereign or unlimited authority, prevented society from falling into it, and so it was necessary in order to establish and maintain law and order.

THE RULE OF LAW AND THE LIBERAL TRADITION

If the rule of law is a synonym for law and order, most States have achieved it, and it is a universally recognised principle. The degree of obedience varies from country to country; but, to use traditional English phrases, the king's peace exists over the whole country and the king's writ runs everywhere. For later generations, however, this was not necessarily enough. An all-powerful monarch or dictator may be as dangerous to the liberty and happiness of the people as a collection of bandits. He may be, in other words, no more than a bigger and better bandit. Louis XIV could claim that he maintained order in his own dominions because he was the State; but some of his subjects escaped with relief across the Channel and discovered with gratitude the comparative liberty that existed on English soil. The rise of liberalism and the burden of despotic rule created popular leaders prepared to rebel. As the liberal tradition developed on English principles and by French methods, many monarchs shared the fate of Louis XVI or were urged unceremoniously into retirement. It was considered necessary to extend the notion and ambit of the rule of law.¹ It ceased to

¹ The notion is to be found, however, like nearly every other notion, in Aristotle. "The rule of the law is preferable to that of any individual": *Politics*, III, 16 (Jowett's translation, Davis ed., 1916, p. 139).

be only a rule among citizens and became also a rule among rulers.

This development results essentially from liberal or liberal-democratic principles, and therefore the rule of law in this sense is not universally accepted. If it is believed that the individual finds his greatest happiness, or best develops his soul, in a strong and powerful State, and that government implies not the chaos of competing interests stimulated by self-seeking demagogues but the unity of the nation behind a wise and beneficent leader, the rule of law is a pernicious doctrine. Or, even if it is believed that there are no universal principles of government, and that each nation must achieve its destiny by the methods which suit the spirit and the ethos of its history, the rule of law, which may perhaps be regarded as suitable for Anglo-Saxons and Frenchmen, is not a product capable of export. Like good wine, it does not travel.

BRITISH EXPERIENCE

THE peculiarity of English history is that absolutism, except for a short time under the Commonwealth, and then only in a mild form (for Cromwell and his army were honest and God-fearing men), has never developed. The king's authority was limited by his barons. They compelled John, for instance, to sign Magna Carta, an instrument which, though intended primarily to safeguard the liberties of lords, was regarded as a safeguard for the liberties of the people by generations that knew not lords and feared only the king. Later kings had to fight the great landowners; and though they often won they sometimes lost. When lords dis-

appeared there was in existence a Parliament strong enough to curb the royal authority, to partake of the royal power, to contest its limits, and finally to destroy the king whose ideas and actions went beyond the bounds of what Parliament thought reasonable. The Revolution of 1642 was not a great social upheaval designed, like the French Revolution, to overthrow a system of despotic government and the society on which it was based, but a mere contest between king and Parliament. Since the final victory of Parliament in 1689, therefore, the rule of law in this liberal sense has existed in England. Indeed, it was an English Parliamentary lawyer, Sir John Fortescue, who first drew attention to its characteristics,¹ and the theorist of the English Revolution, John Locke, who laid down the doctrine of the liberal State.²

Expressed in English terms, the rule of law in this liberal sense requires that the powers of the Crown and of its servants shall be derived from and limited by either legislation enacted by Parliament, or judicial decisions taken by independent courts. It is not enough to say with Dicey that "Englishmen are ruled by the law, and by the law alone"³ or, in other words, that the powers of the Crown and its servants are derived from the law; for that is true even of the most despotic State. The powers of Louis XIV, of Napoleon I, of Herr Hitler, and of Signor Mussolini are derived

¹ See Fortescue, *De Laudibus Legum Angliae*, Ch. XXVII; and cf. Friedrich, *Constitutional Government and Politics*, p. 145, and Hall, "Nulla Poena sine Lege," *Yale Law Journal*, Vol. XLVII, p. 167.

² Locke, *Two Treatises of Government*; and cf. G. Jellinek, *Allgemeine Staatslehre* (3rd ed.), p. 247.

³ See Appendix II

from the law, even if that law be only "The Leader may do and order what he pleases." The doctrine involves some considerable limitation on the powers of every political authority, except possibly (for this is open to dispute) those of a representative legislature. Indeed it contains, as we shall see, something more, though it is not capable of precise definition. It is an attitude, an expression of liberal and democratic principles, in themselves vague when it is sought to analyse them, but clear enough in their results. There are many facets to free government, and it is easier to recognise it than to define it. It is clear, however, that it involves the notion that all governmental powers, save those of the representative legislature, shall be distributed and determined by reasonably precise laws. Accordingly a king or any other person acting on behalf of the State cannot exercise a power unless he can point to some specific rule of law which authorises his act. The State as a whole is regulated by law. For this reason, the doctrine is expressed in continental legal theory by saying that the State is a "legal State"—*Rechtsstaat*, *état de droit*, *stato di diritto*—and it has been the subject of a vast literature.¹ It must be confessed that attempts to analyse its contents have not been very successful. Since fundamentally it requires a limitation of powers, most States have sought to attain it by written constitutions, for such a constitution is fundamental law which limits by express rules the powers of the various governing bodies and thus sub-

¹ The most significant contributions will be found referred to in Battaglia, "Stato Etico e Stato di Diritto," *Rivista Internazionale di Filosofia del Diritto*, Vol. XVII, pp. 237 *et seq.* The term was apparently invented by von Mohl: cf. Llorens, *La Igualdad ante la Ley*, p. 22.

stitutes constitutional government (in large part a synonym for the rule of law¹) for absolutism. It implies also a separation of powers, since the confusion of powers in one authority is dictatorship or absolutism, which, according to liberal ideas, is potential tyranny.²

It contains also the notion of equality, a notion whose scope, however, is as imprecise as the notion of the rule of law itself.³ It was developed primarily as a principle to be used for criticism of the unequal distribution of property, and was so used in England in the Peasants' Revolt and by some of the sects in the Commonwealth. In the England of the eighteenth century, property did not in itself imply powers of government, though of course government was in fact in the hands of the landed interest; but elsewhere property and governmental privileges went together, and those who attacked property attacked privilege also.⁴ In the nineteenth century, the liberal tradition

¹ Cf. Friedrich, *Constitutional Government and Politics*, especially Ch. VII.

² Orlando, *Prefazione al Primo Trattato Completo di Diritto Amministrativo Italiano*, pp. 37 *et seq.*; Battaglia, *op. cit.*, p. 257. Leibholz, "La Nature et les Formes de la Démocratie," *Archives de la Philosophie du Droit*, 1936, p. 137.

³ See Llorens, *La Igualdad ante la Ley*; Leibholz, *Die Gleichheit*.

⁴ "Moral inequality, authorised by positive right alone, clashes with natural right, whenever it is not proportionate to physical inequality; a distinction which sufficiently determines what we ought to think of that species of inequality which prevails in all civilised countries; since it is plainly contrary to nature, however defined, that children should command old men, fools wise men, and that the privileged few should gorge themselves with superfluities, while the starving multitude are in want of the bare necessities of life." Rousseau, *Origin of Inequality*, Everyman ed., p. 238.

ignored economic equality and concentrated upon what has been called "equality before the law."¹ This concept does not imply that property should be distributed equally, nor that the same laws should apply to all persons in the same State. Indeed, the modern differentiation of economic and social functions, together with the growing intervention of the State in economic and social life, makes the latter principle, at least, impossible of attainment. Three-fourths of modern legislation is of no general interest, because it applies to special classes. Nor, apparently, does it necessarily imply political equality: it is only since 1928 that the British Parliamentary system has been based upon complete adult suffrage, and even now it is not proposed that the vote should be given to little children, however much they are doomed to lead us. The notion is really much more limited. It assumes that among equals the laws should be equal and should be equally administered, that like should be treated alike. The right to sue and be sued, to prosecute and be prosecuted, for the same kind of action should be the same for all citizens of full age and understanding, and without distinction of race, religion, wealth, social status, or political influence. There are certain parts of the law, including the ordinary law of contracts, torts, and crimes, which are of general application, which in other words apply to every person who is not incapacitated physically or mentally. Even here, however, a qualification is introduced, particularly in respect of the criminal law: for though the law usually

¹ Dicey's treatment of this principle need not be specifically mentioned here: see Appendix II.

creates crimes for all citizens of full age and understanding, it leaves a very large discretion in its application. Not only is there a large discretion left in practice to the police as to whether they shall or shall not prosecute,¹ but also the courts are expected to inflict punishment, if at all, not merely according to the nature of the crime, but according to the particular circumstances of the criminal. The primary purpose of judicial administration is not to punish crime but to prevent it.

In the criminal law, indeed, the rule of law implies a combination of the notion of equality before the law with the notion that the limits of police powers should be rigidly defined. The rule of law in this sense is expressed in the maxim, derived from nineteenth-century liberalism, *nulla poena sine lege*. Professor Jerome Hall of Louisiana has pointed out² that this includes at least four notions. First, it means that the category of crimes should be determined by general rules of a more or less fixed character. Secondly, it implies that a person should not be punished except for a crime which falls within these general rules; or, as Dicey put it admirably (if his statement be taken to relate only to the criminal law, which in fact it did not), that "no man is punishable . . . except for a distinct breach of law established in the ordinary legal manner before the ordinary courts."³ Thirdly, it may mean that penal statutes should be strictly construed, so that no act may be made criminal which is not

¹ See some aspects of this treated in Ch. VIII, *post*, pp. 246-7.

² Hall, "Nulla Poena sine Lege," *Yale Law Journal*, Vol. XLVII, pp. 165 *et seq.*

³ Dicey, *op. cit.* (8th ed.), p. 183.

clearly covered by the statutes. Fourthly, it may mean that penal laws should never have retrospective effect.

It may be noted that English law does not entirely satisfy these rigorous rules. The category of crimes is determined by general rules, though this does not prevent Parliament from making special exceptions (as by Act of Attainder) if it wishes to do so, nor does it prevent Parliament from delegating the power of making new crimes, as in the Emergency Powers Act, 1920 (though subject to many safeguards). We shall see ¹ that a person may be imprisoned for six months for refusing to give sureties for keeping the peace or for good behaviour. Laws may be made retrospective, though Parliament rarely does so. The courts may create new common law misdemeanours, as they created "public mischief," ² which are necessarily retrospective. Nevertheless, all concepts of this character are vague, and it is the general tendency or spirit of the law and its administration which matters. English lawyers would repudiate, and would rouse a vast public opinion against, such a rule as is enshrined in the German law of the 28th June, 1935: "Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling, shall be punished. If there is no penal law directly covering such an act it shall be punished under the law of which the fundamental con-

¹ *Post*, p. 256.

² *R. v. Manley*, [1933] 1 K.B. 529. See Stallybrass, "Public Mischief," *Law Quarterly Review*, Vol. XLIX, p. 183; Jackson, "Common Law Misdemeanours," *Cambridge Law Journal*, Vol. IX, p. 193.

ception applies most nearly to the said act.”¹ It is the general tendency which matters most.

Above all, the rule of law implies the even less precise notion of liberty. Liberty and equality are of course closely associated, as in the slogan of the French Revolution, “Liberty, equality, fraternity.” Liberty, like equality, was regarded as a fundamental or natural right which had in many States been destroyed by the development of absolute government. “Man is born free; and everywhere he is in chains,” began Rousseau in the *Social Contract*. It was in the cause of liberty that Parliament raised an army against Charles I, and that the Paris crowd captured the Bastille and so spread through the world a message of hope which has not even now quite lost its resonance. Indeed, the reaction to absolutism went very far. Largely through the influence of Kant it was assumed that the alternative to the despotic or police State (*Polizeistaat*) was the State which did nothing save maintain order and conduct external relations, and the latter kind of State has sometimes been called the *Rechtsstaat*.² The same assumption was made by many in Great Britain during the first half of the nineteenth century. Under the influence of Adam Smith and Ricardo trade was freed from the shackles of mercantilism; and generally the Liberal Party, or the Whig wing of the Liberal Party, adopted the principles of *laissez-faire* or individualism, until after the second Reform Act in 1867 the notion of

¹ Quoted Hall, *op. cit.*, p. 175. The Permanent Court of International Justice has ruled that this law could not be applied to Danzig on the ground that it offended against the principle of the *Rechtsstaat*. The Italian, Polish, and Japanese judges dissented.

² See Bluntschli, *The Theory of the State*, pp. 63-6.

a free State exercising considerable functions on collectivist principles began to develop under the influence of the Radical wing of the Party. The writer who studied the nature of the rule of law in England in this kind of background was A. V. Dicey, whose exposition proved to be so acceptable that until recently it was generally assumed that the rule of law and Dicey's exposition of it were the same.¹

DICEY AND THE RULE OF LAW

THE particular principle of the individualist or *laissez-faire* school was that any substantial discretionary power was a danger to liberty. The fact that he held such a principle was not explicitly avowed by Dicey, because he assumed that he was analysing not his own subjective notions (shared, of course, by many of his contemporaries), but the firm and unalterable principles of English constitutional law. It will be convenient to analyse his notion on that basis.²

"No man," he said,³ "is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every

¹ So much so that in the first edition of this work I discarded the phrase and used "the reign of law" instead. I prefer the traditional phrase, and I think that there is now sufficient acceptance of the criticism of Dicey to allow it to be dissociated from his name.

² *Law of the Constitution* (8th ed.), pp. 179 *et seq.*

His "rule of law" contains three elements. One has been mentioned already, *ante*, p. 38; another I shall discuss in Ch. VI; I say something about the third in this chapter. The three elements are discussed together in Appendix II.

³ *Op. cit.*, pp. 183, 184.

system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint." We shall discuss in Ch. VII what he meant by "the ordinary law" and "the ordinary courts." Nor for the moment need we emphasise his notion—derived from an age of *laissez-faire*¹—that government consists in the constraint of body or goods. We need only contest the idea that the rule of law and discretionary powers are contradictory.

If we look around us, we cannot fail to be aware that public authorities do in fact possess wide discretionary powers. Many of them formed part of the law even when Dicey wrote in 1885. Any court can punish me for contempt of court by imprisoning me for an indefinite period. If I am convicted of manslaughter, I may be released at once or imprisoned for life. If I am an alien, my naturalisation is entirely within the discretion of the Home Secretary. If the king declares war against the rest of the world, I am prohibited from having dealings abroad. If the country is in danger, my property can be taken, perhaps without compensation. If a public health authority wants to flood my land in order to build a reservoir, it can take it from me compulsorily. I can be compelled to leave my work for a month or more, in order to serve on a jury. All these powers, and many more, were possessed by public authorities in 1885, and can still be exercised.

Dicey did not mention all these, because nowhere in his book did he consider the *powers* of authorities. He seemed to think that the British Constitution was con-

¹ See Appendix II.

cerned almost entirely with the *rights of individuals*. He was imagining a constitution dominated by the doctrine of *laissez-faire*. The function of government, as he unconsciously assumed, was to protect the individual against internal and external aggression. Given such protection, each individual was allowed to live his life almost as he pleased, so long as he did not interfere with the similar liberty of others. He regarded this as desirable,¹ and therefore tended to minimise the extent to which public authorities could interfere with private action. We are not concerned with its desirability or otherwise. We must point out only that these powers existed. Moreover, the powers possessed by the Government in time of stress were admittedly meagre in his day. This is shown by the long series of Coercion Acts which proved necessary for the government of Ireland, and the enactment of the Defence of the Realm Acts during the war. Since 1885 the powers of the military forces in time of war or rebellion have been strengthened by judicial legislation; the Emergency Powers Act, 1920, has given immense powers for dealing with internal disturbance; stringent Aliens Acts have enabled the Home Office to control the activity of all foreigners; and judicial legislation has added considerably to the powers for seizing property in time of emergency.

Nevertheless, the argument need not be placed entirely on this narrow ground. For the main discretionary power is placed in England not in the executive but in Parliament. Parliament, as has

¹ Dicey was active in politics as a liberal-unionist—that is, a Whig of the Palmerstonian sort. See R. S. Rait, *Memorials of A. V. Dicey*.

already been emphasised, can pass what legislation it pleases. It is not limited by any written constitution. Its powers are not only wide, but unlimited. In most countries, not only the administrative authorities but also the legislature have powers limited by the constitution. This, one would think, is the most effective rule of law. In England, the administration has powers limited by legislation, but the powers of the legislature are not limited at all. There is still, it may be argued, a rule of law, but the law is that the law may at any moment be changed.

Dicey attempts to meet this argument in two ways.¹ "The commands of Parliament," he said, "can be uttered only through the combined action of its three constituent parts, and must, therefore, always take the shape of formal and deliberate legislation." Formal it may be; it may not be deliberate. We saw—Dicey saw before he died in 1922—how the Defence of the Realm Act was passed in 1914. The Cabinet decided that it wanted drastic powers. The majority which it commanded in the House of Commons supported its motion to suspend the Standing Orders. The Bill was passed through at one sitting. The House of Lords did the same. Thus at one stroke, without any long deliberation, the Cabinet acquired the powers it needed. The "gold standard" was similarly swept away in 1931. The Cabinet ordered the Bank of England not to exchange notes into gold. The next day Parliament met and the necessary legislation was passed through not only to make paper currency inconvertible, but also to ratify the illegal acts of the

¹ *Law of the Constitution* (8th ed.), Ch. XIII.

Cabinet and of the Bank before the Act was passed. Here was arbitrary power indeed.

Moreover, Parliament is not limited to the enunciation of general rules. It can give orders which are not strictly legislative. "The will of Parliament can be expressed only through an Act of Parliament," said Dicey¹; but it can express anything whatever. It can condemn a man to death as it condemned the Earl of Strafford. It can release an individual from compliance with the law, as it has done in many statutes. It can enable a landlord to enclose the common land on which his poor neighbours subsist, as it did in the host of Enclosure Acts. It can declare a marriage void or dissolve a marriage, as it frequently did before the Divorce Court was set up. It can enable one person to take the property of another, as it does in nearly every local Act. It can authorise the building of a power station which will be a nuisance to all those who live in the neighbourhood, as it does in some local Acts. "A Bill which has passed into a statute," said Dicey,² "immediately becomes subject to judicial interpretation": but not if Parliament provides otherwise. Nor does it matter much if the judges do pervert Acts of Parliament by their interpretation, for Parliament can always reverse the decision of judges.

Dicey's first argument is therefore not very strong. His second is little stronger.³ "The English Parliament as such has never, except at periods of revolution, exercised direct executive power or appointed the officials of the executive Government. No doubt in modern times the House of Commons has in substance

¹ *Op. cit.*, p. 403.

² *Ibid.*

³ *Op. cit.*, p. 404.

obtained the right to designate for the appointment of the Prime Minister and the other members of the Cabinet. But this right is, historically speaking, of recent acquisition, and is exercised in a very roundabout manner; its existence does not affect the truth of the assertion that the Houses of Parliament do not directly appoint or dismiss the servants of the State; neither the House of Lords nor the House of Commons, nor both Houses combined, could even now issue a direct order to a military officer, a constable, or a tax-collector." From this several results follow, according to Dicey, of which the only one of present importance is that "Parliament, though sovereign, unlike a sovereign monarch who is not only a legislator but a ruler, that is, head of the executive Government, has never hitherto been able to use the powers of the Government as a means of interfering with the regular course of law."

This is not quite exact, as the examples already given will have shown. But it is true that a Parliament is not an apt instrument for the conduct of administration. There is much to be said, indeed this is the whole argument of the doctrine of the separation of powers, for keeping the legislature and the administration distinct, though organically connected. But this does not mean that the rule of law exists only when wide discretionary powers are vested in the legislature, and does not exist when wide powers of *règlementation*—the making of administrative rules for carrying out general legislation and for an emergency—are possessed by an executive or administrative officer.

The wide powers of an administrative officer, indeed,

come from the law and are limited by the law. Either the courts or the legislature will be able to declare void any misuse or illegal extension of them. The supreme powers of Parliament come from the law, but the law cannot, *ex hypothesi*, limit the exercise of these powers.

CONCLUSION

THE truth is that the rule of law is apt to be rather an unruly horse. If it is only a synonym for law and order, it is characteristic of all civilised States; and such order may be based on principles which no democrat would welcome and may be used, as recent examples have shown, to justify the conquest of one State by another. If it is not, it is apt to express the political views of the theorist and not to be an analysis of the practice of government. If analysis is attempted, it is found that the idea includes notions which are essentially imprecise. If it is merely a phrase for distinguishing democratic or constitutional government from dictatorship, it is wise to say so. For democracy rests not on any particular form of executive government, nor upon the limitation of the powers of the legislature, nor upon anything implicit in the character of its penal laws, but in the fact that political power rests in the last analysis on free elections, carried out in a State where criticism of the Government is not only permissible but a positive merit, and where parties based on competing policies or interests are not only allowed but encouraged. Where this is so, government must necessarily be carried on in such a manner as to secure the active and willing consent and co-operation of the people; for a Government that fails to

persuade public opinion will be overthrown at the next election.

Where this exists, the other consequences follow. The existence of an elected legislature necessarily implies a separation of powers, not because it is possible to distinguish functions of government into three classes, but simply because an assembly is not a suitable body to control detailed administration or to decide whether the laws have been broken or not. A people that is free to change the direction of public policy by turning out a Government that does not accord with popular ideas will usually (though not always in respect of each) insist that among citizens engaged in the same kind of activity the laws should apply equally, irrespective of race, religion, colour, social importance, or wealth, and should be administered impartially among all citizens. A democracy necessarily implies equality in this sense, since each is free to choose. Finally, the existence of a free system of government creates an atmosphere of freedom which is more easily felt than analysed, but which excludes, for instance, the use of unconscionable means of obtaining evidence, spying, unnecessary restrictions upon freedom of movement and of speech, and, above all, any attempt to restrict freedom of thought. These are intangibles which nevertheless produce an impression on the mind of any observant person who crosses the boundary from a dictatorial State into a free country. They cannot easily be forced into a formal concept dignified by such a name as the rule of law, and in any case they depend essentially upon the existence of a democratic system. The test of a free country is to examine the status

of the body that corresponds to His Majesty's Opposition.

§ 2. *Written Constitutions and Constitutional Law*

THE CONSTITUTION AS FUNDAMENTAL LAW

A WRITTEN constitution is thus the fundamental law of a country, the express embodiment of the doctrine of the rule of law in one of its senses. All public authorities—legislative, administrative, and judicial—take their powers directly or indirectly from it. Constitutional law is the law of the constitution,¹ the fundamental law which determines these authorities and the general powers which they exercise. A book upon French constitutional law explains, therefore, the principles underlying the distribution of powers in the constitutional laws of 1871 to 1875 (as amended). It will describe the general organisation, the powers of the Chamber and Senate, of the President of the Republic, of the ministers, and of the courts, as expounded in the constitutional laws. Since it will be concerned also with the general principles of constitutional law it will add an explanation of the fundamental rights which were set out in the Declaration of the Rights of Man, and which are still regarded as principles of public policy, binding upon the legislature.

A book on the constitutional law of the United

¹ Constitutional law in general consists in the general principles underlying State organisation and activity in the modern world. The first three volumes of Duguit's *Traité de Droit Constitutionnel* (5 volumes, 3rd ed. 1929-31) are of general application, dealing with the theory of the State and the theory of law. In Germany this is called *Allgemeine Staatsrecht*, or general constitutional law. In England it is called political science.

States of America will deal with much the same subjects. But the United States form a federation. There is a division of powers not only between the public authorities of the United States, but also between the public authorities of the United States on the one hand and of the separate States on the other. Consequently there is a much more complicated system of limitations. Moreover the federal courts have decided that under the constitution they have the right to determine in whom any given power rests. Thus in the United States, as in Canada and Australia, there is a large body of judicial decisions rendered by the courts in dealing with questions as to the distribution of powers. The lawyer has to be familiar with these. Consequently a book on the constitutional law of the United States, or of Canada, or of Australia, must deal in detail with the principles followed by the courts in their interpretation of the constitution.

THE NATURE OF CONSTITUTIONAL LAW

WHATEVER the nature of the written constitution it is clear that there is a fundamental distinction between constitutional law and the rest of the law. It is the law of the written constitution. It deals, therefore, with the selection of legal rules set out in the document and with their meaning and application. Where the rules are subject to judicial interpretation it explains the manner in which they have been construed and applied, and the subsidiary rules which the courts—which need not be the ordinary civil courts but may be, for instance, a special Tribunal of Constitutional Guarantees (as under the Spanish Constitution of 1931)—

have developed by their interpretation. If the constitutional lawyer considered not only the rules *in* the constitution but also the rules made *under* it, he would be concerned with the whole of the law. For he would need to explain the terms of the legislation enacted by the legislature and the rules developed by the courts in the exercise of the judicial functions conferred either directly by the constitution or indirectly through legislation.

Naturally, the term "constitutional law" is never used in this sense. The constitutional lawyer indicates what legislative powers are exercised by the legislature and what powers by the courts, but he does not concern himself with the rules elaborated in the exercise of those powers. So long as they are not unconstitutional—that is, contrary to the constitution—it does not matter to him what they are. There is therefore a clear separation between the constitutional law and the rest of the law. For instance, if an Act of the Congress of the United States regulates the milk trade in the State of New York there may be two questions involved. The first is the meaning of the Act in its application to the parties before the court—what are, let us say, the mutual obligations of the vendor and purchaser; the second is whether the Act is constitutional—whether, that is, Congress has power according to the rules of the constitution to enact a measure of this kind.

§ 3. *The Nature of English Constitutional Law*

NO FUNDAMENTAL LAW IN ENGLAND

THERE is no such clear distinction in Great Britain. Powers are in fact exercised by the King, by Parlia-

ment, by administrative authorities, and by the courts. But they do not come from any fundamental law. The only fundamental law is that Parliament is supreme. The rest of the law comes from legislation or from those parts of judge-made law which have not been abolished by legislation. Strictly speaking, therefore, there is no constitutional law at all in Great Britain; there is only the arbitrary power of Parliament. We can, of course, deal with the same subjects as a continental constitutional lawyer. We can explain the organisation of Parliament—King, Lords, and Commons—and the relations between its parts. We can explain the title of the King, the way in which ministers are appointed and dismissed, and the powers which they exercise. We can explain the process of legislation and the way in which the finances of government are conducted. We can explain the organisation of the courts and give an exposition of private rights and the means by which they are protected.

But in doing this we are not explaining fundamental law. We are dealing in the main with legislation. Some of it also, especially that part which relates to the functions of the courts, is judge-made law. Some of it, such as the procedure of Parliament, is neither in legislation nor in judge-made law, but in rules made by the two Houses or developed by the Speakers of the House of Commons out of a long series of precedents. Still other rules are simply political maxims, constitutional conventions, which might not be called "law" at all.

THE KINDS OF CONSTITUTIONAL RULES IN ENGLAND

THERE are thus four kinds of rules in England which would be inserted in a written constitution. They are:

1. Legislation;
2. Case law, or law deduced from judicial decisions;
3. "The law and custom of Parliament" ;
4. Constitutional conventions.

The legislation does not differ in form from any other legislation. It is passed by Parliament in the same way, and expressed in the same way. Nor does the case law differ in form. Consequently this part of constitutional law may be said to be "part of the ordinary law of the land." It is possible, no doubt, to frame a definition of constitutional law, as it is possible to frame a definition of the criminal law. But it is differentiated only by definition. It does not differ in form from the civil or criminal law.

Some of the rules relating to Parliament are in statutes. A few, such as those prescribing limits of the privileges of members of the House of Commons, are to be found in case law. But many of them are outside the jurisdiction of the ordinary courts. For example, though the lords of appeal take their seats in the House of Lords by statute, and certain bishops are excluded from the House of Lords by statute, in the main the right to sit in the House of Lords is determined by the House of Lords itself. The House of Lords is for some purposes an "ordinary court," for it is the final court of appeal of the United Kingdom. But peerage questions and questions as to the right of a peer to sit

are determined by the House quite apart from its normal judicial functions. Similarly the House of Lords, like the House of Commons, determines its own rules of procedure. It is not by legislation or case law, for instance, that a Bill is read three times in each House. Provided that an Act is passed by the King with the advice and consent of the two Houses, the courts are not concerned to ask by what process the two Houses passed it. No statute would be necessary to provide that Bills drafted by a certain committee should pass each House by being "read" only once.

Similarly, the qualifications of members of the House of Commons are determined by that House. Though the courts now have by statute the right to determine whether a member was duly elected, it is for the House of Commons to say whether he was qualified to be elected, and whether he shall be allowed to take his seat. Moreover, though the courts determine whether a Parliamentary privilege exists, it is for the House of Commons to say whether a privilege has been broken. A man may find himself imprisoned by the order of the House of Commons without any appeal to a court of law. All this forms part of "the law and custom of Parliament," which is so amply explained in Sir Erskine May's great book.¹

CONSTITUTIONAL CONVENTIONS

CONSTITUTIONAL conventions form the subject of the next chapter. It is necessary to explain here only that

¹ Sir T. E. May, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (13th ed., 1924, by Sir T. Lonsdale Webster). See also *post*, pp. 107-14, where the argument is developed.

the legal basis of the constitution was settled by the Revolution of 1688, subject to later legislation. The constitution which is enshrined in the decisions of the courts is therefore the Constitution of 1689. It imagines the King as possessing a substantial authority, determining with the help of advisers chosen by himself the policy which the country is to follow. But since 1689 the Party system has grown up and the general political control is vested in a Cabinet of party members, acknowledging responsibility to the House of Commons. This has developed a series of political understandings or constitutional conventions without any enactment by Parliament. The balance of power in the constitution has been shifted without any formal change in "the ordinary law of the land."

DOUBLE MEANING OF CONSTITUTIONAL LAW

THUS the rules which would be found in a written constitution are spread among four kinds of rules in England. Our "constitutional law" must be taken from four different sources. Only two of them form part of "the ordinary law of the land." When we speak of the law of England we do not normally include constitutional conventions and the law and custom of Parliament. Consequently constitutional law has a double connotation in England. Sometimes it means the rules which would be incorporated in a written constitution if we had one; sometimes it means only the legislation and case law relating to the constitution. The one includes the other. How far we are entitled to use the term "law" with the wider meaning is a question which need not now be

discussed.¹ But clearly the lawyer would have a strange notion of the constitution if he were allowed to concern himself with part of it only.

Dicey said ² that it was that part only which concerned the lawyer. "With conventions or understandings he has no direct concern. They vary from generation to generation, almost from year to year. Whether a Ministry defeated at the polling booths ought to retire on the day when the result of the election is known, or may more properly retain office until after a defeat in Parliament, is or may be a question of practical importance. The opinions on this point which prevail to-day differ (it is said) from the opinions or understandings which prevailed thirty years back, and are possibly different from the opinions or understandings which may prevail ten years hence. Weighty precedents and high authorities are cited on either side of this knotty question; the dicta or practice of Russell and Peel may be balanced off against the dicta or practice of Beaconsfield and Gladstone. The subject, however, is not one of law but of politics, and need trouble no lawyer or the class of any professor of law. If he is concerned with it at all, he is only so far as he may be called upon to show what is the connection (if any there be) between the conventions of the constitution and the law of the constitution. This, the true constitutional law, is his only real concern. His proper function is to show what are the legal rules (i.e. rules recognised by the courts) which are to be found in the several parts of the constitution. . . . The

¹ See Appendix III.

² *Law of Constitution* (8th ed.), pp. 30, 31.

rules determining the legal position of the Crown, the legal rights of the Crown's ministers, the constitution of the House of Lords, the constitution of the House of Commons, the laws which govern the Established Church, the laws which determine the position of the non-established Churches, the laws which regulate the army—these and a hundred other laws form part of the law of the constitution, and are as truly part of the law of the land as the articles of constitution of the United States form part of the law of the Union.”

More succinctly, Dicey said later on,¹ “You are called upon to deal partly with statute law, partly with judge-made law.” Yet of the seven branches of constitutional law which he had expressly mentioned, two are to be found neither in statutes nor in judge-made law. The constitution of the House of Lords is determined by rules laid down by the House of Lords, and not in its judicial capacity as a “court.” The constitution of the House of Commons is in part determined by statute, though this is a modern innovation dating from 1832; the qualifications of its members and its methods of operation are determined by the House of Commons itself.

In any case, it is a singular constitutional law which mentions the Cabinet because it is referred to in the Ministers of the Crown Act, 1937, but cannot say what it does; which knows of the Prime Minister because he is three times mentioned in statutes,² but can say of

¹ *Op. cit.*, p. 31.

² Chequers Estate Act, 1917; Ministers of the Crown Act, 1937; Physical Training and Recreation Act, 1937.

him only that he appoints the grants committee under the Physical Training and Recreation Act, 1937, that he occupies Chequers and that he has an annual salary of £10,000; and which distinguishes a minister from a civil servant by the statement that the latter is and the former is not within the terms of the Superannuation Acts.¹ It is a constitutional law which says very little indeed about the constitution. It is not a system at all, but a mass of disconnected rules depending upon historical accidents. Some rules, such as the relations between the two Houses as laid down in the Parliament Act of 1911, have been enacted because enactment was the only solution of a constitutional difficulty. Others have not been enacted because the rules worked reasonably well without formal enactment. Some rules, such as those relating to the use of the army in England, have been decided by judges; others, such as those relating to the use of the Great Seal and of the signet in formal communications with foreign countries and with the Dominions, have not received judicial interpretation.

If the constitution were put down in writing, as the Constitution of the United States was put down, the important constitutional conventions would be put in as well. Even in the Dominion constitutions, where

¹ This is the only distinction "recognised by the courts." It is in any case not precise, for there are persons holding offices of profit under the Crown who do not come within the Superannuation Acts. See *Royal Commission on the Civil Service* (1929): *Introductory Memoranda relating to the Civil Service*, pp. 1-3. Mustoe, *Law and Organisation of the Civil Service*, pp. 15-27. But most ministers are now specifically referred to in the Ministers of the Crown Act, 1937.

British constitutional conventions might have been presumed, some of them have been incorporated as parts of the constitution. The British Cabinet, the creation of convention, is represented by the Federal Executive Council of Australia,¹ the Executive Council of the Union of South Africa,² and the Government of Ireland.³ It is indeed noticeable that the later constitutions incorporate more of the constitutional conventions. A constitution which stated "the law" without the conventions would be grotesque, and a constitutional law which recognises the Temple and Westminster but not Whitehall is absurd.

Necessarily rules of law are more precise than constitutional conventions. The former can be found set out clearly in legislation or may be inferred, as to their major principles, from the decisions of courts. This characteristic follows essentially from their nature; there are Governmental institutions whose function it is to lay down rules of law. On the other hand, constitutional conventions are established by practice growing into obligatory rules, and at any given moment it may not be certain whether a suggested rule has been generally accepted or not. For instance, it is not at the present time settled whether the King is bound to dissolve Parliament at the request and at the request only of the Prime Minister.⁴ "Weighty

¹ Constitution of the Commonwealth of Australia, s. 62.

² South Africa Act, s. 12.

³ Constitution of Eire, art. 28.

⁴ See Jennings, *Cabinet Government*, pp. 308-18. For Dicey's own views on the relations between King and ministers in this connection, see the letter in *The Times*, 15th September, 1913, reprinted in Jennings, *op. cit.*, pp. 441-3.

precedents and high authorities are cited on either side of this knotty question." Yet the major principles are firmly fixed and can be stated with almost as much accuracy as the major principles of the common law.¹ Even some of the less important rules are settled. Dicey in 1885 was uncertain "whether a Ministry defeated at the polling booths ought to retire on the day when the result of the election is known, or may more properly retain office until a defeat in Parliament." If Dicey had formulated the question with his usual precision, and had asked whether a Government ought to resign when the Opposition obtained a majority at the polls, a reasonably certain answer could have been given in 1885, for the precedent had been set by Mr. Disraeli in 1868 and followed by Mr. Gladstone in 1874. To-day there is not the least doubt about the answer, and we may say definitely that the Government ought, as Mr. Disraeli did in 1868, to resign without meeting Parliament. How long the rule has existed may be a matter of doubt; but the practice is seventy years old.

It follows from Dicey's own example that constitutional conventions do not necessarily "vary from generation to generation, almost from year to year." A constitutional lawyer writing in 1885 would be less certain than one writing in 1935; for some of the ideas of the eighteenth-century constitution were continued after 1832, and some time elapsed before the consequences of the three extensions in the franchise in 1832, 1867, and 1884 became obvious; but though the prac-

¹ The book mentioned in the previous note is an attempt to state the constitutional conventions governing Cabinet government.

tice is constantly changing, the main principles of democratic government, as operated in England, are clear enough. Nor is the law itself settled according to the principles laid down by Blackstone. The franchise was altered twice within fourteen years of Dicey's last edition. Within the single Parliament of 1936-7 legislation changed the succession, established "permanent" provisions for a regency, altered the salaries of ministers and the rules governing (with the assistance of constitutional conventions) the distribution of ministers between the two Houses of Parliament, gave a salary to the Leader of the Opposition, altered the salaries of some judges, modified the law relating to the Civil List, and added to the salaries of members of Parliament.

The conventions are not "politics," save in the sense that all law and all government are "politics." They are rules whose nature does not differ fundamentally from that of the positive law of England.¹ The professor of law who is not concerned with them treats only of bits and snippets of the constitution suspended in thin air. Fortunately Dicey did not accept his own limitations, either in the *Law of the Constitution*² or in his more polemical writings.³ Nor is there any reason why any other lawyer or class of a professor of law should so limit himself. We shall see that, without the conventions, the legislation and even the case law are quite unintelligible.

¹ See Appendix III.

² See especially the Introduction.

³ Among them *England's Case against Home Rule* (an attack on the Home Rule Bill of 1886) and *A Fool's Paradise* (an attack on the Home Rule Bill of 1912).

THE LIMITS OF CONSTITUTIONAL LAW

LEAVING aside questions of constitutional conventions, and dealing with legislation and case law only, there is still a problem of definition. The absence of any written constitution makes it difficult to distinguish between that part of constitutional law which is part of the law of the land and the rest of the law. Such a constitution leaves much of the political organisation of the country to be dealt with by ordinary legislation. For example, though the franchise or electoral qualification is normally set out, the machinery for elections and the boundaries of the constituencies are not. These matters are dealt with not by the constitution, but by the legislature. In England, however, the qualifications of electors, the machinery of election, and the distribution of seats in the House of Commons are all to be found in ordinary statutes, the Representation of the People Acts, 1918 to 1928.

Similarly a constitution would provide for the legal position of the King and of his ministers, but it would not give in detail their powers, nor would it deal with the numerous less important administrative authorities and the organisation of the civil service. These matters, too, would be left to the legislature. Further, the constitution might say something of the superior courts, but nothing of the inferior courts. And if it dealt with the functions of the courts it would contain nearly the whole of the law, for the function of the courts is to apply the law; the law indicates what is the "judicial power" vested in the judges.¹

How, then, are we to draw the line between con-

¹ *Ante*, p. 63.

stitutional law in the strict sense and the rest of the law? The answer is that no line can be drawn with any precision in the case of Parliament and the administration. It is possible to say that some parts are of more importance than others. The Treasury is more important than the Department of Overseas Trade; the London County Council is more important than the Government of Gibraltar; the franchise is more important than the precise boundaries of the St. Albans division of Hertfordshire. In particular, we cannot differentiate, as Maitland does,¹ between those parts of the law relating to administration which may be called "constitutional law" and those less important parts which may be called "administrative law." Such a division is familiar to all continental countries and to the United States, because there the constitutional law is fundamental law, while the administrative law is either enacted by the legislature or developed by the courts. Any such division in England would be purely arbitrary, depending entirely upon the emphasis which the individual author placed upon the various parts of the governmental system. A classification must be either *material*, based on the nature of the subject-matter, or *formal*, based upon its source or procedure.² A classification based on a purely subjective notion like "importance" is no classification. How is one to assess the relative importance of the rules governing the Church of England and the Unemployment Assistance Board? Or the Territorial Army and the Metropolitan Police Force?

¹ *Constitutional History*, pp. 526-39.

² These terms are used in the lawyer's, not the metaphysician's sense.

The problem of the "judicial power"—the third of the great branches into which most written constitutions divide the functions of government—seems at first sight to present even greater difficulty. The constitutional law of the United States must explain certain of the functions of the Supreme Court of the United States because the judicial power of the United States is given by the constitution to that court. But that is because the rules of the constitution are clearly separated from the ordinary law. In England there is no such separation. To explain the judicial power in England involves, as has been said, the explanation of all the law of England, for that is the judicial power; and the application of the constitutional law is with us one of the functions involved in the judicial power. Thus, if we try to explain the judicial power under English constitutional law, we get into a circle: we explain that the judicial power includes the application of the rules of constitutional law, but that constitutional law defines the judicial power. For with us there are no special rules separated from the ordinary law: constitutional law is part of the ordinary law.¹

The inevitable conclusion is that we cannot define constitutional law as including the judicial power. It is in itself part of the judicial power. As lawyers we stand on the courts, so to speak, and look at the actions

¹ The distinction is made clearer by examining the position of federal administrative law in the United States. When Congress gives judicial powers to an administrative body there is at once a question of constitutional law raised—what is the function of the Supreme Court in respect of this body?—for by the constitution the judicial power is vested in that court. In England it is simply a question of the relation of the new rules to the rest of the law.

of men within the jurisdiction of the courts. When we look at the actions of men who form the governmental machinery, we are considering constitutional law. When we are looking at men acting in other ways, we are considering the civil and criminal law. Constitutional law, so far as it is law at all in the sense of rules applied by the courts, deals with the relations between the courts and the *other* organs of the constitution. That is, it relates to the organisation and functions of Parliament and of the administration.

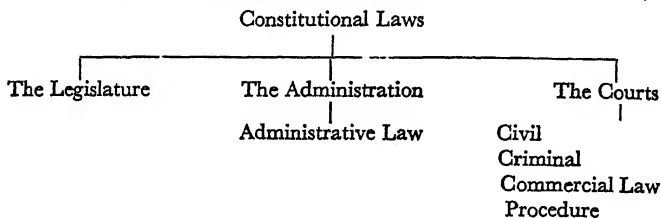
The truth is that a writer on "the constitution" and a writer on law look at the machinery of the State from different angles. The writer on the constitution includes all the machinery and all the rules under which it functions—he includes, therefore, the courts and all the law which they apply. The writer on law, on the other hand, begins with the legal system. First he deals with its organisation—courts and judges; then he considers the method of operation—the law of procedure and evidence. Finally, he considers the functions of the system, that is, the law, divided into constitutional law, criminal law, and civil (including commercial) law. The constitutional law is one of the functions of the judicial system, and it deals with the *other* organs of the State, Parliament, and the Administration, and their functions.¹

This is not, of course, the same as constitutional law on the continent, or in any country with a written con-

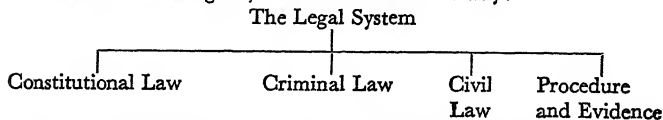
¹ The organisation of the courts and their rules of procedure and evidence apply (in England) equally to constitutional law and to civil law.

stitution.¹ It contains also electoral law and administrative law, but it does not contain the law relating to the more important judicial authorities. For this reason I much prefer the term "public law," which is used on the continent to include both constitutional law and administrative law. It is a very large subject; if the common law were codified it would probably be found that public law contained two-thirds of the law of England, in bulk and not necessarily in importance. It includes not only electoral law, but also income-tax law, the law of customs and excise, the law relating to death duties, local government law, and much of industrial law (i.e. the law relating to State insurance, factories, etc., but not the law relating to workmen's compensation²).

¹ In France, the administration is dealt with in separate courts. Thus the French, being a logical race, see their constitution in this way:



If we want to be logical, we must see it in this way:



But, of course, the law and custom of Parliament and the constitutional conventions are outside this tree.

² Because it concerns only employers, employees, and the courts; it does not concern Parliament as an institution, or the administration

THE CONVENTIONS OF THE CONSTITUTION

§ 1. *The Nature of Constitutional Conventions*

GOVERNMENT ACCORDING TO RULE

"POLITICAL institutions," said John Stuart Mill,¹ "are the work of men; owe their origin and their whole existence to human will. Men did not wake on a summer morning and find them sprung up. Neither do they resemble trees, which, once planted, 'are aye growing' while men 'are sleeping.' In every stage of their existence they are made what they are by voluntary human agency." But men being what they are, they tend to follow rules of their own devising; they develop habits in government as elsewhere. And when these men give place to others, they tend to follow the same practices. Capacity for invention is limited, and when an institution works well one way it is deemed unnecessary to change it to see if it would work equally well in another. For, indeed, people begin to think that the practices ought to be followed. It was always so done in the past, they say; why should it not be done so now? Thus within the framework of the law there is room for the development of rules of practice, rules which may be followed as consistently as the rules of law, and which determine the procedure which the men concerned with government must follow.

¹ *Representative Government* (1st ed., 1865), p. 4.

These rules Mill referred to as "the unwritten maxims of the constitution."¹ Twenty years later Dicey called them "the conventions of the constitution,"² while Anson referred to them as "the custom of the constitution."³ None of the phrases exactly expresses what is meant. The maxims of the common law are as unwritten as those outside the law. "Convention" implies some form of agreement, whether expressed or implied, while "custom" assumes first that the law enforced in the courts need not be custom, and secondly that an extra-legal rule cannot be created by express agreement. Dicey's phrase has now been sanctioned by fifty years' common use, and will therefore be employed in this chapter. It also has an advantage which was not foreseen by Dicey, that it correctly expresses the nature of some of the most important of modern conventions, those relating to the Dominions.⁴

THE PURPOSE OF THE CONVENTIONS

THE short explanation of the constitutional conventions is that they provide the flesh which clothes the dry bones of the law; they make the legal constitution

¹ *Op. cit.*, p. 87.

² *Law of the Constitution* (8th ed., pp. 22, 23; 1st ed., pp. 24, 25). Sir William Holdsworth ("The Conventions of the Eighteenth Century Constitution," 17 *Iowa Law Review*, p. 161) says that Dicey took the idea from Freeman, who wrote in 1872. Actually, Mill's analysis is perfectly definite, and the essence of it is to be found in Austin (*Jurisprudence*, 4th ed., pp. 273 *et seq.*). Dicey quotes Mill's *Representative Government* on other matters.

³ Sir William Anson, *Law and Custom of the Constitution*, Vol. I, 4th ed. (by Sir Maurice Gwyer), p. 23.

⁴ These are expressly referred to as conventions in the *Report of the Conference on the Operation of Dominion Legislation* (Cmd. 3479), pp. 19-20.

work; they keep it in touch with the growth of ideas. A constitution does not work itself; it has to be worked by men. It is an instrument of national co-operation, and the spirit of co-operation is as necessary as the instrument. The constitutional conventions are the rules elaborated for effecting that co-operation. Also, the effects of a constitution must change with the changing circumstances of national life. New needs demand a new emphasis and a new orientation even when the law remains fixed. Men have to work the old law in order to satisfy the new needs. Constitutional conventions are the rules which they elaborate.

Sir William Holdsworth has explained these characteristics.¹ "Conventions must grow up at all times and in all places where the powers of government are vested in different persons or bodies—where in other words there is a mixed constitution. 'The constituent parts of a state,' said Burke,² 'are obliged to hold their public faith with each other, and with all those who derive any serious interest under their engagements, as much as the whole state is bound to keep faith with separate communities.' Necessarily conventional rules spring up to regulate the working of the various parts of the constitution, their relation to one another and to the subject. And not only will conventions spring up in these circumstances, but they will always have two common characteristics. In the first place, it is at these conventions that we must look if we would discover the manner in which the constitution works in

¹ "The Conventions of the Eighteenth Century Constitution,"
17 *Iowa Law Review*, p. 162.

² *French Revolution*, p. 28.

practice. They determine the manner in which the rules of law, which they presuppose, are applied, so that they are, in fact, the motive power of the constitution. In the second place, these conventions are always directed to secure that the constitution works in practice in accordance with the prevailing constitutional theory of the time."

One qualification must, however, be introduced. Generally speaking, it is perfectly true that the conventions presuppose the law. The conventions of Cabinet government, for instance, assume the legal relations between king and Parliament. Moreover, in most other States the conventions grow up, around and upon the principles of the written constitution. Thus a whole host of conventions has grown up around and upon the Constitution of the United States, regulating, for instance (apart from legislation, which also applies), the method of electing the President, the length of his term of office (it is by convention and not by law that he cannot be re-elected for a third term), the composition and operation of his Cabinet, his relations with Congress, and so on.¹ Similarly, there are numerous conventions filling out the exiguous terms of the French constitutional laws of 1875.² There is a particularly good example in the power of dissolution. In the United Kingdom Parliament is elected for a maximum term but may be dissolved by the King. This is law; but in practice no Parliament continues for its maximum term, and every Parliament since 1832, to go

¹ See Horwill *Usages of the American Constitution*.

² See M. Leroy, "Les Tendances du Pouvoir et de la Liberté en France au XX^e Siècle," *Archives de la Philosophie du Droit*, 1936, pp. 7 *et seq.*

back no further, has been dissolved under the royal prerogative. In France the law similarly prescribes a maximum term but confers a power of dissolution upon the President of the Republic with the consent of the Senate. Yet this power has not been exercised since 1877, and in practice the Chamber of Deputies continues for its full term.¹ Such conventions are apt to grow within a very short time. Thus a writer on the German Constitution of 1919 was able to refer in 1923 to "conventions, which have already begun to quite a considerable extent, not only to supplement, but also to modify, if not actually to supersede, express provisions."²

Nevertheless, though the conventions are built in the first instance on the foundation of law, when once they have been established they tend to form the basis for the law. When Parliament passes legislation conferring powers upon the King, it knows perfectly well that they will be exercised by ministers; and, as we shall see, the legislation sometimes refers to institutions which are purely of conventional creation, and sometimes is so bound up with a conventional method of administration that it cannot be interpreted except in the light of the conventions. Indeed, judges who are familiar with both find some difficulty in distinguishing between them.³ In practice, the two are inextricably

¹ Politically, the difference in these conventions is of fundamental importance. The royal prerogative being exercised by the Prime Minister, the power of dissolution is a means for controlling the House of Commons. The means does not exist in France, and this is one of the reasons for the weakness of most French Governments as compared with most British Governments. See *post*, pp. 165-7.

² Oppenheimer, *The Constitution of the German Republic*, p. 9.

³ See *post*, pp. 114-23.

mixed, and many conventions are as important as any rules of law.

"The association of constitutional conventions with law has long been familiar in the history of the British Commonwealth; it has been characteristic of political development both in the domestic government of these communities and in their relation with each other; it has permeated both executive and legislative power. It has provided a means of harmonising relations where a purely legal solution of practical problems was impossible, would have impaired free development or would have failed to catch the spirit which gives life to institutions. Such conventions take their place among the constitutional principles and doctrines which are in practice regarded as binding and sacred whatever the powers of Parliaments may in theory be."¹

THE CABINET SYSTEM

MANY of the most important constitutional conventions relate to the Cabinet system.² It was settled in 1689 that Parliament had supreme power and could control every aspect of national life. The King's powers were limited. In particular, his "hereditary" revenues being insufficient to provide for the government of the country, he needed Parliamentary sanction for the levying of taxation. Further, the defence of his throne compelled him to keep a standing army, yet the Bill of Rights had made illegal the keeping of a standing army in time of peace. Parliamentary sanction was therefore necessary, and Parliament refused to sanction an army for longer than a year at a time.

¹ Report of the Conference on the Operation of Dominion Legislation, 1929 (Cmd. 3479), p. 20; see further on the nature of conventions Jennings, *Cabinet Government*, Ch. I.

² See Jennings, *Cabinet Government*.

On the other hand, Parliament did not propose to turn itself into an administrative body. It did not set up committees to conduct foreign affairs, to supervise trade, to appoint judges and add to the commissions of the peace, to pardon offenders, to command the army and navy, to levy taxation, and to control expenditure. These functions were left to be exercised by the King with the help of such ministers and officers as he chose to appoint.

Thus the King needed Parliament, and Parliament needed the King. Each of them had powers (for the time being) ample enough to stultify the government of the country. If Parliament had said, "You get no money" the King might have said, "Then I go back to the Netherlands." Some *modus vivendi* was necessary if government was to function at all. The constitutional conventions, as Mill explained,¹ were developed to enable the government to be carried on. The result of their development was to create a Cabinet of ministers appointed by the King, but having a sufficient number of supporters in the House of Commons to enable them to persuade Parliament to pass the legislation and vote the taxation which the King's government needed. The necessary support was found by strict Party affiliation and the selection as ministers of Party leaders. Thus a new balance was set up. The Cabinet could not function without the Party organisation in Parliament. The leading statesmen therefore took care to organise their parties, while the parties controlled the statesmen whom they selected as leaders. A new series of conventions grew up within the parties,

¹ *Representative Government* (1st ed.), p. 87.

and political understandings regulated the working of the Party system both in Parliament and outside.

THE CONVENTIONS AND THE PREROGATIVE

ONE of the earliest results, naturally, was that the powers which are legally exercised by the King—the royal prerogative—were in practice exercised by the Cabinet or by the individual ministers who formed the Cabinet.¹ The King acted on the “advice” of the Cabinet ministers; and in practice he could not refuse to take that advice unless he could find another set of ministers who could keep a majority in the House of Commons. Hence there was by constitutional convention a transference of the royal prerogative to the Cabinet. These conventions are therefore, as Dicey put it,² “rules for determining the mode in which the discretionary powers of the Crown (or of the ministers as servants of the Crown) ought to be exercised.”

But they are much more than that. The Cabinet, and the conventional distinction between ministers and civil servants (conventional because both are legally servants of the King), are the most spectacular results of the growth of the constitutional conventions. Nevertheless, these go very much further. They provide for the whole working of the complicated Governmental machine. Indeed, the prerogative no longer has the importance which it possessed when Dicey first wrote. Foreign affairs, matters relating to the Dominions, colonies, and protectorates, the army and

¹ For not every question of government is of sufficient importance to be discussed in the Cabinet. See Jennings, *Cabinet Government*, pp. 177 *et seq.*

² *Law of the Constitution* (8th ed.), p. 418.

navy, and the control of the civil service, are still exercised normally under prerogative powers, but they do not form the bulk of Cabinet discussion; and six only of the ministers are normally concerned with prerogative matters. For the period of collectivism which began about 1870¹ has added enormously to the functions of government. Education, the control of trade and industry, social insurance, pensions, agriculture, collectivist local government organisation, housing and town planning, and many other subjects now occupy much of the time of Parliament and Government.² The Treasury, the Home Office, the Scottish Office, the Board of Trade, the Board of Education, and the Ministries of Health, Labour, Agriculture and Fisheries, Transport, and Pensions are essentially concerned with statutory functions; and these are usually vested not in the King but in the ministers at their head.

Indeed, the Cabinet does not consider the nature of the legal source from which powers are derived. It is concerned only with the problems of government. The nature of each problem is presented, usually, in a memorandum prepared by the appropriate Department and circulated by the Cabinet Secretariat with the consent of the Prime Minister and the Chancellor of the Exchequer. The solution suggested may be the preparation of a Bill for presentation to Parliament, or administrative action by a Department, or joint action by two or more Departments. The Cabinet itself is

¹ In fact, as soon as the franchise was extended to the skilled workers in the towns. See Dicey, *Law and Opinion in England* (1st ed.), p. 64.

² See Ch. I, § 1.

concerned only with the finding of a solution. If that solution has been suggested by the Department and receives Cabinet approval, the minister concerned informs the Department and instructs it to carry out the decision. If no immediate solution appears, or if the Cabinet cannot agree immediately, a committee is appointed to consider the question and to report to the Cabinet. If the committee suggests that legislation is necessary, and the Cabinet agrees, the committee, either in the first instance or after securing Cabinet consent to the principle, determines the main lines of the Bill. The Department, with the assistance of the Parliamentary Counsel to the Treasury, secures the drafting of the Bill. If the Cabinet committee has been kept in existence for the purpose, it considers the Bill; in any case the Bill is presented to the Home Affairs Committee of the Cabinet, which deals with points of legal detail. In due course the Bill is reported to the Cabinet, and, after approval, introduced by a minister. All this procedure arises from the fact that the Cabinet has a life and an authority of its own. It is not concerned with prerogative powers alone; it acts whether there are already legal powers or not. It co-ordinates the policy and the action of the Departments and produces unity in the constitutional system.¹

CONVENTIONS AND THE RELATIONS BETWEEN THE HOUSES OF PARLIAMENT

DICEY pointed out² that some of the conventions regulated the relations between the two Houses.

¹ On all this, see Jennings, *Cabinet Government*, Ch. IX.

² *Law of the Constitution* (8th ed.), p. 423.

“ There are some few constitutional customs or habits,” he said, “ which have no reference to the exercise of the royal power. Such, for example, is the understanding—a very vague one at best—that in case of a permanent conflict between the will of the House of Commons and the will of the House of Lords the Peers must at some point give way to the Lower House. Such, again, is, or at any rate was, the practice by which the judicial functions of the House of Lords are discharged solely by the Law Lords, or the understanding under which Divorce Acts were treated as judicial and not legislative proceedings. Habits such as these are at bottom customs or rules meant to determine the mode in which one or other or both of the Houses of Parliament shall exercise their discretionary powers, or, to use the historical term, their ‘privileges.’ ”

Of the three conventions which Dicey mentioned, two have now disappeared. The relations between the two Houses are in the last resort determined by the Parliament Act of 1911. Divorce Acts are now extremely rare; for they have been superseded in practice by the divorce jurisdiction of the High Court.¹ But there are many more conventions regulating Parliamentary procedure than those which Dicey mentioned. To a large extent the rules are to be found in “ the law and custom of Parliament,” which in this book are discussed separately. Nevertheless, the law and custom enable any majority to ride roughshod over a minority. For the Standing Orders of either House can be suspended, abolished, or altered by a majority vote. Normally they are not: usually the procedure

¹ And because of the creation of the Irish Free State.

is carried on according to set forms with due regard to minority rights in accordance with conventions. There is not a fundamental antagonism between the two sides of the House of Commons. Arrangements for the conduct of business are made between the representatives of the parties—the “whips,” who are responsible for maintaining the internal party organisation—“behind the Speaker’s chair.”

The whole system of “pairing” provides an admirable example. The Government is anxious, for political reasons, to make and keep its majority at the highest possible figure. The Opposition is equally anxious to reduce it as much as possible. But it is clearly impossible for all members of Parliament to be present at each division. When, therefore, a Government member is likely to be absent, he informs his Whip, who finds out from the Opposition whip whether some member on the other side is likely to be absent. If this arrangement can be made, both members know that their absence will not affect the result of the division. They are then said to be “paired.”

Again, there is the practice, which is not even formally embodied in Standing Orders, by which committees of the House represent the Party strengths in the House. There is nothing except convention which restrains the Government from appointing a committee consisting only of members of the Government Party. Similarly, it is convention only which determines that a speech from the Government side shall be followed by a speech from the Opposition. Indeed, the whole idea of “His Majesty’s Opposition” is a product of convention. Government would be

possible without the co-operation of the Opposition. The Government majority would march through the lobbies, voting for the Government, with monotonous regularity. The Government would get its legislation and its financial resources: the Parliamentary sessions would be shorter and ministers would be in the unusual position of having plenty of time for controlling their departments. It would, no doubt, be the end of Parliament as a living institution just as the absence of debate has made the Privy Council into a formal instrument of no importance. Nevertheless it would be possible, and only the conventions provide for the continuance of the present system.

CONVENTIONS AND THE DOMINIONS

THERE is a third group of constitutional conventions of the greatest practical importance. Until the enactment of the Statute of Westminster in 1931, the relations between the United Kingdom and the Dominions, and the whole idea of "Dominion status," were entirely the product of conventions.

Until 1931 the Dominions—Canada, Australia, the Union of South Africa, New Zealand, and Newfoundland, but not the Irish Free State—were legally "colonies."¹ They differed only from other colonies by reason of constitutional conventions. For in a colony the Governor acted and still acts (except in Southern Rhodesia) according to his own discretion, limited only by the instructions of the Colonial Office and the necessity of securing the maximum collaboration from the colonists. But in a Dominion the Gover-

¹ Interpretation Act, 1889, s. 17.

nor or Governor-General acted on the advice of responsible ministers in much the same way as the King acts in the United Kingdom. The change first came about in Canada about 1850. The Governor-General of the United Provinces of Upper and Lower Canada (now Ontario and Quebec) received instructions to act on the advice of ministers. In this way "colonial self-government" was born. The new Constitution of the Dominion of Canada, enacted as the British North America Act, 1867, contemplated this form of government, but created a constitutional system "similar in principle to that of the United Kingdom"¹ not by turning British conventions into law, but by enacting law and leaving the conventions to be adopted as such. A Privy Council was provided for but not a Cabinet; yet it is the Cabinet and not the Privy Council which governs. In Australia and the Union of South Africa a few of the conventions were converted into law; but, in the main, self-government there too rests on conventions.

IMPERIAL CONFERENCES

THE Dominion Parliament and Government, together with the governments and Parliaments of the Provinces, exercised after 1867 all the powers of internal government. But all external relations were still a matter for the British Government. The two cannot be clearly separated, however, and the development of Canada as a protectionist country necessarily involved a growing interest in external affairs. Through the growth of consultation with the Government of the

¹ British North America Act, 1867, preamble.

United Kingdom, the Dominion came to take a larger and still larger share in the discussion of external affairs. We may notice in particular that the presence of colonial Premiers at the Queen's Jubilee in 1887 and the Diamond Jubilee in 1897 was used for Colonial Conferences at which matters of common interest were discussed. Another Colonial Conference in 1906 decided upon regular meetings; and Imperial Conferences, as they are now called, have met at intervals since 1911.

Developments proceeded rapidly before the war, but the efforts which the Dominions (as they were now called) made during the war resulted in their obtaining large powers for dealing with external affairs. They were represented in the Imperial War Cabinet which discussed the general operations of the war in 1918; they were represented at the Peace Conference at Versailles; their plenipotentiaries signed the Peace Treaties; and all the Dominions, except Newfoundland and also India, became members of the League of Nations.

DOMINION STATUS

THE new "Dominion status"¹ implied rules governing the relations between the Dominions and the United Kingdom, but the law was not changed an iota. The rules were purely conventional. Many of them were discussed and formally agreed upon at the Imperial Conferences of 1923 and 1926. Indeed, the Conference of 1926 was able to lay down an oft-quoted

¹ For a longer explanation of Dominion status, see Jennings and Young, *Constitutional Laws of the British Empire*, Ch. III.

general principle governing the relations between the United Kingdom and the Dominions. "Their position and mutual relation," it was said,¹ "may be readily defined. They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."

Yet the Dominions were still, in law, colonies, and their legal position was essentially one of subordination in external and in some internal affairs. This principle of equality of status, therefore, was a generalisation of constitutional conventions which completely reversed the effects of the law, and the Conference took steps to modify the law. A Sub-Conference met in 1929, and its Report,² after modification by the Imperial Conference of 1930,³ formed the basis of the Statute of Westminster, 1931, which altered parts of the law.

PRESENT CONVENTIONAL RULES

THE effect of the Statute was, in the main, to establish the legislative independence of the Dominions. But the methods of co-operation are still essentially conventional. The rules for the making of treaties by any part of the British Commonwealth of Nations are still to be found in the Reports of the Imperial Conferences

¹ *Imperial Conference, 1926: Summary of Proceedings* (Cmd. 2768), p. 14.

² *Report of the Conference on the Operation of Dominion Legislation* (Cmd. 3479).

³ *Imperial Conference, 1930: Summary of Proceedings* (Cmd. 3717).

of 1923,¹ 1926,² and 1930.³ The position of the Governors-General is determined by agreements at the Conferences of 1926⁴ and 1930.⁵ The rules for communications between Dominion Governments and foreign Governments are to be found in the same Reports.⁶ The system of communication and consultation between the Governments of the British Commonwealth of Nations was agreed upon at the same Conferences.⁷ In 1930 it was decided that disputes between parts of the Empire should be submitted to a Commonwealth Tribunal specially appointed for the purpose.⁸

THESE CONVENTIONS ARE FORMALLY EXPRESSED

ALL these matters are not regulated by law, but by constitutional conventions expressly agreed upon by the representatives of the Dominions and of the United Kingdom at Imperial Conferences, and formulated in their Reports. They thus receive a more precise and definite shape than any of the conventions relating to the internal government of the United Kingdom.⁹

¹ *Imperial Conference, 1923: Summary of Proceedings* (Cmd. 1987), pp. 13-15. Reprinted in the Report of the 1926 Conference, pp. 20-1.

² *Imperial Conference, 1926: Summary of Proceedings* (Cmd. 2768), pp. 20-5.

³ *Imperial Conference, 1930: Summary of Proceedings* (Cmd. 3717), pp. 27-9.

⁴ Cmd. 2768, p. 16.

⁵ Cmd. 3717, pp. 26-7.

⁶ Cmd. 2768, pp. 26-7; Cmd. 3717, pp. 29-30.

⁷ Cmd. 2768, p. 27; Cmd. 3717, pp. 27-9.

⁸ Cmd. 3717, pp. 22-4. It has never functioned.

⁹ The mandated territories provide another example. Constitutionally, their government is within the entire discretion of the Crown. Yet the United Kingdom is bound by the express terms of the mandates approved by the Council of the League of Nations. The fact that the obligations arise out of international law makes no difference; see *post*, pp. 155-7.

But there are two conventions which have received even more formal and authoritative expression, for they are embodied in the preamble to the Statute of Westminster. They are:

“Inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom.”

Again, “It is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion.”

The importance of the first of these conventions was demonstrated in the abdication of Edward VIII. Before the Prime Minister could advise the King on the proposal that the King should marry the present Duchess of Windsor without her becoming Queen, he had to consult not only his own Cabinet but also the Prime Ministers of the Dominions, for legislation would have been necessary. Again, the Dominions had to be consulted before the Bill which became His Majesty's Declaration of Abdication Act, 1936, was introduced. The Bill in fact recited that Canada had

“requested and consented” and that Australia, New Zealand, and South Africa had “assented.” The Irish Free State enacted its own legislation.¹

The purpose of the second convention is to support the express enactment of a similar provision in section 4 of the Statute itself, which, as will be explained in the next chapter,² is of doubtful validity. Its object, therefore, is to bolster up a rule of law by the express and authoritative statement of a constitutional convention. The other convention is a direct limitation upon the legislative authority of the Parliament of the United Kingdom. The “constitutional position” refers to the general principle of Dominion status, expressed in the Report of 1926, and supported partly by the express law of the Statute of Westminster and partly by the conventional rules expressed in the reports of the Imperial Conferences.

OBJECTS OF THE CONVENTIONS

THESE three classes of constitutional conventions support the suggestion which was made at the beginning of this chapter. The conventions have two functions to fulfil. In the first place, they enable a rigid legal framework—and all laws tend to be rigid—to be kept up with changing social needs and changing political ideas. The modern Cabinet functions as an instrument for the control of the large administrative organisation which has been necessitated by the acceptance of collectivist ideas. Changing Parliamentary practices indicate a

¹ See Jennings, “The Abdication of King Edward VIII,” *Politica*, 1937, pp. 287 *et seq.*

² *Post*, pp. 145–8.

change in the part which Parliament plays in the national life and the multiplicity of functions which Parliament is called upon to debate. The development of the conventions relating to Dominion status has been necessary in order that the Dominions might remain in the British Empire and yet play their part in international society.

Secondly, the conventions enable the men who govern to work the machines. Government is a co-operative function, and rules of law alone cannot provide for common action. The Cabinet system co-ordinates the work of a multiplicity of administrative authorities, and secures that the legislature and the administration shall have common aims. Parliamentary practices enable Government and Opposition to work together, though in apparent conflict, for the development of the national well-being. Government becomes twice as difficult, as Ireland and South Africa and Germany show, where Parliamentary opposition is carried to extremes. Conventions relating to the Dominions enable the United Kingdom to collaborate, somewhat uneasily, in a common external policy. We might add one more example of a constitutional convention, of very recent growth. It is now recognised that in framing social legislation the appropriate department must consult the appropriate outside "interests." For example, the Home Office would not think of producing a new Factories Bill without consulting the General Council of the Trades Union Congress. The same body would normally be consulted on an Unemployment Insurance Bill, though the practice of the Labour Government in this connection was attacked

at the polls as "outside dictation." Certainly no substantial measure dealing with local government would be passed without consultation with the associations of local authorities.

The scope of this convention is still vague. It probably applies only to Bills which do not in principle produce any party antagonism. It may not yet be a convention, but an administrative practice which is slowly changing into a convention. Nevertheless, it is clear that soon the appropriate interests will claim a "right" to be consulted.¹ We shall then have another very useful convention whereby Parliament, through the Departments, can make use of external expert knowledge. It will be a new means of collaboration, whereby that section of the population which is most interested in a branch of law can be made to collaborate in its making.²

§ 2. *Law and Conventions*

THE COURTS

THE distinction between laws and conventions has been made by Dicey.³ The laws are rules which are enforced by the courts. The conventions are rules

¹ "It has been the practice in the past, and one which has been appreciated, for the Minister to consult with this Association, upon legislative proposals . . . and it is to be regretted that the Minister was not able to adopt this course in reference to a matter of such importance as the withdrawal of the subsidies." Minutes of the Housing Committee, Association of Municipal Corporations, *Municipal Review*, 1933, p. 91.

² For the practice, see particularly by the evidence on behalf of the Ministry of Health, *Committee on Ministers' Powers: Minutes of Evidence* (Vol. II, 1932), pp. 148-72. The subject will be dealt with more fully in Jennings, *Parliament*, Ch. VII.

³ *Law of the Constitution* (8th ed.), p. 23.

which are not enforced by courts. The distinction appears to be plain and unambiguous; but it is by no means free from difficulty.

In the first place, the emphasis upon the courts, though natural to an English lawyer, is somewhat misplaced. Most of the modern law is created by legislation and much of it is put into execution or "enforced" by administrative authorities. We are concerned particularly with public or constitutional law, and primarily the responsibility for enforcement rests with administrative authorities, including the police. It is true that generally speaking questions of interpretation are in the last resort determined by the courts, though there are many cases where their jurisdiction has been excluded. The most obvious example to a constitutional lawyer is the Parliament Act, 1911, where the essential questions have to be determined by the Speaker of the House of Commons, and it is provided that his certificate "shall be conclusive for all purposes, and shall not be questioned in any court of law." It is true also that where it is considered that the best means of inducing obedience to a rule is to create a criminal offence, the jurisdiction of awarding punishment is invariably (it is believed) given to a criminal court. But this is not the only means of securing obedience. For instance, where the Public Health Acts impose duties upon private citizens the sanction is generally a criminal proceeding; but where they impose duties upon local authorities the sanction is generally a complaint to the Minister of Health. Thus local authorities must provide their districts with adequate sewers and sewage disposal

works. If a local authority fails to do so, however, with the result that, through private citizens having exercised their right to connect their drains with the sewers a sewer overflows and floods my cellar, my only remedy—the only means which I have of enforcing the duty—is a complaint to the Minister of Health.¹

In the second place, leaving aside for the moment the House of Lords (and ignoring certain local courts), the courts and their jurisdiction are determined by legislation. The power of the courts to enforce rules is derived from statutes, and the rule which gives the power is just as much law (in any sense in which one would desire to use the term) as the rules which are enforced. This argument, combined with the preceding argument, suggests that the distinction is between conventions and legislation. The Supreme Court of Judicature, however, itself makes law by its decisions. Its existence is due to the Supreme Court of Judicature Act, 1925, which repealed and re-enacted the Supreme Court of Judicature Act, 1873. The powers conferred by those Acts are, however, the powers exercised by the old courts of common law and equity, subject to statutory modifications and subsequent interpretations. It would be far-fetched to suggest that the rules which Sir Edward Coke culled from the decisions of the mediæval courts are part of legislation merely because the authority of the present Supreme Court is derived from a statute. Moreover, the highest civil and

¹ See *Pasmore v. Oswaldtwistle U.D.C.*, [1898] A.C. 387, and the numerous other cases quoted in the notes to s. 13 of the Public Health Act, 1936, in Jennings, *Law of Public Health*, pp. 42–8.

criminal court is the House of Lords, whose decisions override all decisions of inferior courts, and whose main jurisdiction is not derived from legislation at all. In any case, if it is correct, as will be urged,¹ that the legal authority of Parliament is derived from the common law, it is not possible to insist that the common law is derived from legislation.

The House of Lords creates another difficulty. In law, the House of Lords as a court and as part of the legislature is regarded as the same body. By a convention at least a hundred years old the peers without judicial experience do not sit to hear appeals from inferior tribunals. We cannot, however, differentiate laws from conventions by saying that the laws are those rules which by law are enforced by the House of Lords and by convention by certain lords only. Also, the appellate powers of the House of Lords are not the only powers of law enforcement. The House has original jurisdiction in impeachments, the trial of peers for treason or felony, and breaches of its own privileges. In each of these cases the tribunal is the House itself. Moreover, the House of Commons is a court, at least for the purpose of dealing with breaches of its own privileges.²

THE CUSTOMARY BASIS OF POLITICAL AUTHORITY

THESE difficulties, like many others under the British system, are due to the absence of a written constitution. Where there is such a document it can be said that rules in, or made under powers conferred by, the document

¹ *Post*, pp. 105, 144-5.

² May, *Parliamentary Practice* (13th ed.), Ch. II and III.

are law; while rules which grow up outside are not laws but conventions. No continental writers except formalists like Kelsen in fact make such a distinction; for it is still necessary to legitimate the constitution—to find rules which validate the constitution itself. A wider definition of law is therefore adopted, and generally includes what an English lawyer would call conventions. French writers, for instance, include the Declaration of the Rights of Man as law (*droit*, of course, not *loi*), though its terms are not to be found in the constitutional laws of 1875 nor established under them. However, emphasis on rules in and not in the constitution would make a useful formal distinction. With us no such distinction is possible. All the Governmental institutions have been established either by custom or convention, or by the authority of an institution so established, and their powers are derived either from custom or convention, or from institutions established by custom or convention. The rules which govern these institutions, as well as the rules enunciated by them, are of the same kind, whether they are called laws or customs or conventions.¹

If they are called laws, however, it is essential to remember that the word is used in a much wider sense than in the phrase “the laws of England” or “English law.” Those phrases are by no means free from ambiguity, for reasons which will appear; but at least

¹ This is a dogmatic assertion of a definite theory of law. As this book is intended primarily for comparatively immature students, I have thought wise, in this edition, to leave it so. The first edition was, however, also used by more advanced students of jurisprudence and political science, and I have therefore included a note, necessarily inadequate, on the theory of law in Appendix III.

it would not be said that the rule that the Prime Minister and not the Cabinet advises the King to dissolve Parliament (a rule, as it happens, of very recent growth) is one of the laws of England.

There were in 1601 (to take a definite date) three sets of institutions which were recognised by general consent to have powers of law-making—the King in Council, the King in Parliament, and the courts of “law”¹ and (if we may include what was really a later development, because nothing turns on this point) equity. As might be expected from a system based on custom and on competing claims for jurisdiction, their respective powers were by no means well defined, and were in fact in issue during the disputes of the Stuart period. Parliament made law in the form of legislation, the courts made law by inferring general principles from individual decisions, and the King in Council made law both by ordinances and by inferring general principles (especially in the Star Chamber) from individual decisions. Moreover, each House of Parliament claimed to have certain privileges, including the right to determine certain kinds of questions and so to create precedents out of which rules might be drawn. Nor were the relations between these institutions clear. Whether the courts could be controlled by the Council, whether the King could suspend or dispense with legislation, whether the courts were bound by legislation, were all questions which were effectively settled only as a result of two revolutions.

¹ This is, of course, yet a third use of the term—a use which gives a translator many a headache until he learns that he cannot translate it at all.

When there was universal acquiescence in the revolution settlement, say by 1750, there were definite rules recognised as to the mutual relations of King, Parliament, and courts, though there were (and are still) competing claims as between the House of Commons on the one hand and the courts and the House of Lords on the other. This recognition was not only among lawyers but also among those who acted on behalf of the institutions themselves.

LEGISLATION AND COMMON LAW

LEGISLATION is drafted with the knowledge and intention that much of it will be interpreted by the courts. The decisions of the courts, whether in interpretation of statutes or in elaboration of the traditional principles known as the rules of common law and equity, are recognised as of equal validity with those contained in legislation, save only that they can be repealed or modified by legislation. On the other hand, the courts recognised the supreme authority of Parliament. It is, therefore, *common law* that Parliament can do as it pleases. It could, and did, abolish all the old courts of common law and equity, superseding them by the Supreme Court of Judicature, though giving that court the same functions (subject to qualifications) as the superseded courts. Parliament, the old courts, and therefore the Supreme Court, recognised the appellate powers of the House of Lords. The Supreme Court and the House of Lords therefore develop the rules of common law and equity so far as they have not been superseded by legislation, and (subject to legislation) provide authoritative interpre-

tations of legislation. They recognise the power of Parliament to overrule their decisions by legislation.

KING IN COUNCIL

THE King and the Privy Council, however, lost nearly all of their law-making functions. They have, as it is said, no powers save those that the law allows. By this is meant that their powers must be sought either in legislation or in the decisions of the courts. The powers which the courts have definitely recognised include the power to establish a constitution in a settled colony and to legislate generally for a conquered or ceded colony.¹ These are clearly law-making functions, though the rules themselves presumably do not become part of the laws of England. The King in Council also (subject to legislation) retained the right to hear appeals from colonial and other courts outside the United Kingdom and from Courts of Prize and Admiralty. Admiralty functions have now been transferred to the Court of Appeal and the House of Lords; and Prize Courts administer international law. We may say, therefore, that none of the laws of England are made by the King or the King in Council except under authority delegated by Parliament.

The King in Council does, however, make rules of much the same kind. The courts recognise that, apart from legislation, the relations between the King and his servants are matters within the discretion of the King. Accordingly, if he makes rules for his servants, they are not the concern of the courts. Such rules are in fact

¹ See Jennings and Young, *Constitutional Laws of the British Empire*, pp. 26-9.

made by Order in Council, Treasury minute, and Departmental regulations, for the government and discipline of the civil service.¹ Presumably they are not part of the laws of England, though for civil servants they have much the same effect, and are not usually referred to as constitutional conventions.

THE HOUSES OF PARLIAMENT

THE authority of Parliament over the Crown and the courts has long been recognised; but that authority is exercised in a recognisable form, that of Act of Parliament, and the position of the two Houses, particularly the House of Commons, has never been precisely settled. The House of Lords has established its claim to settle all questions relating to its own constitution and therefore to lay down the rules of peerage law; it makes and enforces its own standing orders; it claims and has exercised certain privileges on behalf of its members, and punishes breaches of them; it is recognised by the courts to have appellate powers in matters of "law" and equity; it is also recognised by the courts to have the right to try peers for treason or felony. Indeed, it appears never to have been in conflict with the courts, perhaps because its appellate powers in matters of common law (as distinct from equity) have never been challenged. On the other hand, the House has claimed to exercise a more extended jurisdiction, which the House of Commons has challenged, and the claim appears to have been given up. It sought to act as a court of first instance in civil causes, and gave it up in 1670 after conflict with the House of Commons, and

¹ *Post*, pp. 177-85.

then only through the mediation of the king.¹ Its claim to an original jurisdiction over crimes was also contested by the Commons and given up.² Appellate jurisdiction in equity was persisted in in spite of the opposition of the Commons,³ and is not now challenged.

The House of Commons has disputed with all the other authorities. It has disputed with the king its power to nominate and, in substance, elect its Speaker,⁴ and as to its privileges generally.⁵ It has disputed with the House of Lords its own right to determine disputed elections and the right to vote at elections,⁶ and also about the jurisdiction of the Lords.⁷ It has disputed with the courts whether it had the sole right to determine its privileges or whether the courts had a right to determine whether a privilege existed or not.⁸ Its right to regulate its proceedings is now unchallenged, as is its right to impeach a person for high crimes and misdemeanours before the House of Lords.

There is thus a series of rules determined partly by legislation and partly by decisions or resolutions of the two Houses. In the main, the resolutions and decisions are not contradictory to the common law, because the courts have admitted that each House possesses a very large jurisdiction. In respect of the privileges of the House of Commons, however, the decisions of the House

¹ Anson, *Law and Custom of the Constitution* (5th ed.), Vol. I, pp. 381-2.

² May, *Parliamentary Practice* (13th ed.), p. 63.

³ *Ibid.*

⁴ Anson, *op. cit.*, p. 155.

⁵ *Ibid.*, Ch. IV, s. iv, *passim*.

⁶ *Ibid.*, pp. 179, 191-2, and 195.

⁷ *Supra*.

⁸ See the debates on the Aylesbury election and on *Stockdale v. Hansard*, 9 A. & E. 203.

and the decisions of the courts, including the House of Lords, are to some extent in conflict. The House has always claimed the right to determine the nature and extent of its own privileges, and as late as 1840 it resolved "That no Court of Justice has jurisdiction to discuss or decide any question of Parliamentary privilege which arises before it, directly or incidentally."¹ Indeed, it went further, and resolved "That the vote of the House of Commons declaring its privilege is binding upon all Courts of Justice in which the question may arise."² It is one thing, however, to state and exercise a jurisdiction, and another to declare that that jurisdiction is enforceable against another authority of independent standing; and the courts refused to follow either resolution, asserting that they had a right to determine whether or not a privilege existed.³

Sir William Anson used expressions which seem to resolve this conflict in favour of the courts. "The privileges of Parliament, like the prerogative of the Crown," he said, "are rights conferred by law, and as such their limits are ascertainable and determinable, like the limits of other rights, by the courts of law." There is, however, no justification for this statement. The prerogative of the Crown was brought within the common law, as determined by the courts, as the result of two revolutions, and the result has received general acceptance. On the other hand, the relations between the law stated by the House of Commons and the

¹ Anson, *op. cit.*, p. 192.

² *Ibid.*, p. 193.

³ *Stockdale v. Hansard*, 9 A. & E. 203.

common law stated by the courts have never been determined. In the main, they are not contradictory. On the point of the determination of the extent of privileges, however, they are; and neither is superior to the other. The great Parliamentary lawyer, Sir Erskine May, stated in 1844,¹ and the statement has been repeated in twelve subsequent editions²:

"Each House, as a constituent part of Parliament, exercises its own privileges independently of the other. They are enjoyed, however, not by a separate right peculiar to each, but solely by virtue of the law and custom of Parliament. There are rights or powers peculiar to each . . . : but all privileges, properly so called, appertain equally to both Houses. These are declared and expounded in each House; and breaches of privilege are adjudged and censured by each: but still it is the law of Parliament that is thus administered.

"The law of Parliament is thus defined by two eminent authorities: 'As every court of law hath laws and customs for its direction, some the civil and canon, some the common law, others their own peculiar laws and customs, so the High Court of Parliament hath its own peculiar law, called the *lex et consuetudo Parliamenti*.' This law of Parliament is admitted to be part of the unwritten law of the land, and as such is only to be collected, according to the words of Sir Edward Coke, 'out of the rolls of Parliament and other records, and by precedents and continued experience'; to which it is added, that, 'whatever matter arises concerning either House of Parliament, ought to be discussed and adjudged in that House to which it relates, and not elsewhere.'³

"Hence it follows that whatever the Parliament has constantly declared to be a privilege, is the sole evidence

¹ May, *Law, Privileges, Proceedings and Usage of Parliament* (1st ed.), p. 44.

² *Ibid.* (13th ed.), pp. 72-3.

³ The quotations are from 1 Bl. Comm. 163, except that ascribed to Coke, which is from 4 Co. Inst. 15, and is itself quoted by Blackstone.

of its being part of the ancient law of Parliament. 'The only method,' says Blackstone, 'of proving that this or that maxim is a rule of the common law, is by showing that it hath always been the custom to observe it'; and 'it is laid down as a general rule that the decisions of courts of justice are the evidence of what is common law'¹ The same rule is strictly applicable to matters of privilege, and to the expounding of the unwritten law of Parliament."

LAW AND CUSTOM OF PARLIAMENT

THUS the law and custom of Parliament is a different branch of law, administered in different courts, the High Court of Parliament, from the common law, which is administered by the Supreme Court of Judicature. Whether it is called part of the laws of England is a matter of definition. If it is, then the laws of England deal with three kinds of rules, legislation, the case law of the courts, and the law and custom of Parliament; though the last is composed partly of legislation and conflicts with the second only in exceptional cases. As is implied in the name, there is a "custom" as well as a "law" of Parliament. Nor is it possible to draw a nice distinction between them. There are practices, particularly as to the relations between Government and Opposition, which have never been the subject of resolutions of the House of Commons or of decisions of the Speaker. The House does not formally take cognisance of them. It knows that something goes on "through the usual channels" or "behind the Speaker's Chair." Complaint is made if the usual practice is not followed. These practices or conventions are, however, somewhat different from the prac-

¹ 1 Bl. Comm. 68.

tices of which the House takes note, which are the subject of resolutions or of decisions of the Speaker, and which are, therefore, recorded in the Journals of the House. Nor is the formal "custom" thus established in every respect ancient. The practice of asking questions before the commencement of public business, for instance, is less than one hundred years old; but it is covered by decisions of the Speakers, sometimes mentioned in the House and recorded in the Journals, but often taken when questions are disallowed and not put upon the order paper and, therefore, not mentioned in the House at all. There is, therefore, a formal distinction between the "custom," which can be ascertained either from the Journals or from the books of precedents compiled by the Clerks at the Table, and the "conventions," which are a mere matter of practice, though recognised as obligatory, and are enshrined, so to speak, in the hearts of members and party officials.

Most of these "conventions" relate to the operation of the party system, which is merely an aspect of Cabinet government. The principles governing the working of that system have never been formally recognised by Parliament or by the courts. So far as the courts were concerned, they developed too late. The principles of constitutional law established by the courts recognise the constitution of the Revolution settlement. Institutions and practices which have grown up since that time have not received formal recognition by the courts, and the rules relating to them are not part of the common law. Accordingly the rules relating to the formation and operation of the

Cabinet, the relations between the Prime Minister and other ministers, between the Government and the Opposition, and many more, are not in legislation, nor in the common law, nor in the law and custom of Parliament. There is a formal distinction of the kind recognised by Dicey, though his way of putting the matter, as often with him, over-emphasised the importance of the common law and of the Supreme Court.¹

NO DISTINCTION OF SUBSTANCE

ON the other hand, there is no distinction of substance or nature. The conventions are like most fundamental rules of any constitution in that they rest essentially upon general acquiescence. A written constitution is not law because somebody has made it, but because it has been accepted. Anyone can draft a paper constitution, but only the people concerned in government can abide by it; and if they do not, it is not law. It is easy to show that the Parliament summoned by William of Orange was not a Parliament, that accordingly William and Mary were not lawfully made joint monarchs, that the Parliament which pretended to ratify the Bill of Rights was not a Parliament, that the Bill of Rights was not law, that Anne was not Queen of England, that the Act of Settlement and the Acts of Union were not law, and that therefore George VI has no right to the throne and the United Kingdom does not exist—provided only that the “law” in question

¹ Perhaps the above argument shows that the unusual accusation made against me by M. Paul Léon, of giving currency to a Diceyan heresy, is based upon a misconception. I do not deny that conventions are *droit*; I deny only that they are common law. See *Politica*, Vol. II, pp. 398-402; *Archives de Philosophie du Droit*, 1937, pp. 223-7.

was that of 1687. In fact, however, the Revolution settlement was a revolution settlement, and revolutions, if successful, always make new law. What made William and Mary monarchs instead of James II and the person who called himself James III was the fact of recognition, not a pre-existing rule of law. All revolutions are legal when they have succeeded, and it is the success denoted by acquiescence which makes their constitutions law.

CONVENTIONS RECOGNISED BY LEGISLATION

NOR is the line between legislation and case law, on the one hand, and conventions, on the other hand, so clear that the one does not recognise the other. We have seen that some conventions are inserted as such in the preamble to the Statute of Westminster, 1931.¹ Some of the institutions which are due to the growth of conventions are in fact recognised by legislation. Thus the office of Prime Minister, though it has been in existence since the early years of the eighteenth century and was one of the key positions in the constitution, was not mentioned in legislation until 1917. The Chequers Estate Act, 1917, enables the official "now popularly known as Prime Minister" to occupy the Chequers Estate as a furnished country residence. The Ministers of the Crown Act, 1937, provides for the payment of a salary of £10,000 a year to "the person who is Prime Minister and First Lord of the Treasury," and provides that any person who "has been Prime Minister and has as First Lord of the Treasury" taken the oath prescribed for the First Lord of the Treasury

¹ *Ante*, p. 96.

shall be entitled to a pension of £2,000 a year. The Physical Training and Recreation Act, 1937, provides that the Board of Education may make certain grants "in accordance with recommendations made by the committee appointed for the purposes of this Act by the Prime Minister."

Again, the Cabinet, perhaps the most important Governmental institution in the country, was quite unknown to legislation and to the common law until 1937; but now the Ministers of the Crown Act, 1937, provides that certain ministers with lower salaries shall receive salaries of £5,000 a year if and so long as they are members of the Cabinet, and the date upon which a minister of the Crown becomes or ceases to be a member of the Cabinet will be published in the London Gazette. The same Act provides that the Leader of the Opposition shall be paid a salary of £2,000 a year. The Leader of the Opposition means "that member of the House of Commons who is for the time being the Leader in that House of the Party in opposition to His Majesty's Government having the greatest numerical strength in that House"; and in case of doubt as to which is the Party in opposition having the greatest numerical strength or as to who is the leader in the House of that Party, the question will be determined by the Speaker. Thus Party, Opposition, and the Leader of the Opposition are for the first time recognised by legislation.

It will be noticed that these provisions do not validate or legalise the conventions. They recognise that they exist. Salaries are given to the Prime Minister, the members of the Cabinet, and the Leader of the Opposi-

tion because it is considered that they perform valuable constitutional functions. The Prime Minister does perform legal functions because he is usually First Lord of the Treasury also, and now he has the function as Prime Minister of appointing a statutory committee ; but his main functions, the functions of Cabinet ministers as such, and the functions of the Leader of the Opposition, are all determined by conventions. Nor is it impossible for the conventions to be converted into laws because they are conventions. The Irish Free State Constitution Act, 1922 (now superseded by the Constitution of Ireland enacted by Dáil Éireann under the Statute of Westminster, 1931), provided that " the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada, and the *law, practice, and constitutional usage* governing the relationship of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State." If the question had ever arisen, the courts would have been called upon to say what were the constitutional conventions governing the relations between Canada and the United Kingdom. Similarly, an Act of the Parliament of the Union of South Africa, the Status of the Union Act, 1934, refers expressly to constitutional conventions. The Act incorporates into law certain of the conventions of Dominion status. For instance, it declares that where the South Africa Act, the Constitution of the Union of South Africa, refers to the King, this shall be deemed to be a reference to " the King acting on the advice of his Ministers of State for the Union " ; but it goes on

to provide that this provision shall not affect certain sections of the South Africa Act " and the constitutional conventions relating to the exercise of his functions by the Governor-General under the said sections." This is not a provision which can be interpreted by courts; but it may have to be interpreted by the legal advisers of the King, the Governor-General, and the ministers of the Union.¹

CONVENTIONS AND CASE LAW

INDEED, Parliament always enacts legislation with the knowledge that it will be carried out by a responsible Government. If it applies to Great Britain, the responsible Government will be that of the United King-

¹ This example reinforces the argument in Ch. II, that conventions are the business of a constitutional lawyer even when they are not interpreted by courts. A lawyer is not concerned only with litigation. Another example may be drawn from Canada. Discussing the question of the requisition of ships in Canada in 1917, the Canadian Minister of Justice made a report which includes the following paragraph:

"The Minister submits that in his view the question to be determined is not one of legal power but of constitutional right. This distinction is well recognised in the conventions which control the exercise of legislative powers. For example, the Parliament of the United Kingdom has the legal power but not the constitutional right to legislate directly in respect of Canadian affairs and in doing so to repeal *pro tanto* the British North America Acts. It is submitted that the exercise of His Majesty's prerogative with respect to Canada must be governed by the like considerations. It is the Parliament of Canada alone which constitutionally can determine and prescribe the burdens to be borne by this Dominion or by any of its citizens for the purposes of this or any other war. Similarly when the prerogative of the Crown is to be exercised, the Minister has no doubt that in respect of all matters which involve a contribution by citizens domiciled in this country, this prerogative must be exercised upon the advice of Your Excellency's Ministers and not upon the advice of the Government of the United Kingdom." See Dawson, *Development of Dominion Status*, pp. 169-70.

dom. If it applies to a Dominion—for instance, a Dominion constitution—it is assumed that the Dominion Government will be responsible to the Lower House of the Dominion legislature. Consequently the courts have sometimes found it necessary to interpret the legislation in the light of the conventions governing responsible government. A few examples among many may be quoted.

In *Ryder v. Foley*¹ the High Court of Australia was called upon to interpret a Queensland statute which conferred power to dismiss a police officer on proof submitted for the approval of "the Government." The question was whether this meant the Governor in Council or a minister. Griffith G.J. said that it was well known that only a small proportion of matters is ever submitted to the Crown, and that this was intended in Australia when self-government was established, and the court held that approval of the appropriate minister was enough. This practice of delegation to ministers is, however, a conventional practice, and the act of a minister is regarded, unless the function is actually vested in the minister by law, and even then for some purposes, as the act of the Crown. In any case, there is nothing about responsible government in the Constitution of Queensland. In two later cases the Judicial Committee of the Privy Council was similarly called upon to interpret the word "Government." In *Commercial Cable Co. v. Government of Newfoundland*,² it was held that a rule of the House of Assembly in Newfoundland, made under statute, to the effect that every

¹ (1906) 4 C.L.R. 422.

² [1916] 2 A.C. 610.

contract over a certain amount made by the Government of Newfoundland should be laid before the House was binding on the Governor in Council because it was responsible to the Legislature. Again, in a case relating to the boundary of Northern Ireland,¹ the Judicial Committee had to interpret the expression "the Government of the Free State, the Government of Northern Ireland, and the British Government." "Their Lordships have no hesitation in holding that the expression is to be taken in its natural and ordinary meaning, namely, the respective Executive Governments responsible to their respective Parliaments. In the case of the Free State and of Northern Ireland the determination of the Government would be constitutionally expressed through the Governor as advised by his ministers."

The idea of responsible government has even been used to interpret the distribution of legislative powers. It is now a well-known rule for the interpretation of the British North America Act, 1867, that the powers conferred by the Act "cover the whole area of self-government within the whole area of Canada."² There is, however, nothing about self-government in the Act, though it was well known that it was the intention to confer it within the whole area of Canada. A similar principle has been applied in Australia. In considering in *Baxter v. Commissioners of Taxation*³ whether the Parliament of a State could tax a Common-

¹ *Report of the Judicial Committee of the Privy Council in the Irish Boundary Question* (Cmd. 2214, 1924), especially p. 3.

² *Attorney-General for Ontario v. Attorney-General for Canada*, [1912] A.C. 571, at p. 581.

³ (1907) 4 C.L.R. 1087, at p. 1121.

wealth officer in respect of his salary, the High Court of Australia said: "The purpose of the constitution was the creation of a new State, the Commonwealth, intended to take its place among the free nations, with all such attributes of sovereignty as were consistent with its being still 'under the Crown.'" The court held that for this among other reasons it should follow the view of the Supreme Court of the United States and not that of the Judicial Committee of the Privy Council. In the *Engineers' Case*,¹ however, the High Court came to the opposite conclusion: "In view of the two features of the common and indivisible sovereignty and *responsible government*, no more profound error could be made than to endeavour to find our way through our own constitution by the borrowed light of the decisions, and sometimes the dicta, that American institutions and circumstances have drawn from the distinguished tribunals of that country." In this respect, therefore, the conclusion was different, though the argument was in part the same, that the constitution provided for responsible government. In fact, however, it says nothing about it.

In *British Coal Corporation v. The King*,² the Judicial Committee of the Privy Council used another constitutional convention. The question for determination was whether the Parliament of Canada had power under the Statute of Westminster, 1931, to abolish the right of the Crown to grant leave to appeal to the Privy Council in a criminal case. Incidentally, therefore,

Amalgamated Society of Engineers v. Adelaide Steamship Co., (1920) 28 C.L.R. 129, at p. 148.

² [1935] A.C. 500.

the nature of the jurisdiction of the Judicial Committee of the Privy Council was in issue. The Judicial Committee is merely a statutory committee of the Privy Council. Formally, it does not decide a case but merely reports to the King in Council, who makes an order giving effect to the Committee's decision. Technically, therefore, the Committee is not a court, but an advisory committee. The Committee decided, however, that it was a court. "It is clear that the Committee is regarded in the Act (the Judicial Committee Act, 1833) as a judicial body or court, though all it can do is to report or recommend to His Majesty in Council, by whom alone the Order in Council which is made to give effect to the report of the Committee is made. But according to constitutional convention it is unknown and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee, who are thus in truth an appellate court of law." In other words, the law is that the Committee is a court of law because by convention it is a court of law. It may be thought that this goes very far; but it does show that courts are not ignorant of constitutional conventions and sometimes feel called upon to apply them.

Following this example, the late Chief Justice of Canada recently and quite unblushingly actually converted a constitutional convention into law. In a case which may be conveniently referred to as *In re Minimum Wages Act*,¹ the Supreme Court of Canada was

¹ *In re Weekly Rest in Industrial Undertakings Act; In re Minimum Wages Act; In re Limitation of Hours of Work Act*, [1936] S.C.R. 461. The quotation is from pp. 476-7.

asked to say whether the Dominion Parliament had power to give effect to certain international "conventions" relating to matters otherwise within the powers of the Provinces. Incidentally, the power of the Dominion Government to enter into such "conventions" was raised. Duff C.J. on behalf of himself and Davis and Kerwin JJ. pointed out that the Imperial Conferences had recognised constitutional conventions conferring a treaty-making power upon the Dominions.¹ He continued: "Constitutional law consists very largely of established constitutional usages recognised by the courts as embodying a rule of law. An Imperial Conference, it is true, possesses no legislative authority. But there could hardly be more authoritative evidence as to constitutional usage than the declaration of such a conference. The Conference of 1926 categorically recognises treaties in the form of agreements between Governments in which His Majesty does not formally appear. . . . As a rule, the crystallisation of constitutional usage into a rule of constitutional law to which the courts will give effect is a slow process extending over a long period of time; but the Great War accelerated the pace of development in the region with which we are concerned, and it would seem that the usages to which I have referred, the practice, that is to say, under which Great Britain and the Dominions enter into agreements with foreign countries in the form of agreements between Governments and of a still more informal character, must be recognised by the courts as having the force of law." This argument was not followed by the Judicial Committee of the Privy

¹ See *ante*, pp. 94-5.

Council, who decided on other grounds that the Dominion Parliament had no power to enact the legislation.¹ As it stands, it is not consistent with the practice of the courts, which is the common law. The constitutional usages which were incorporated into the common law were those of the end of the seventeenth century. The treaty-making power is vested in the king, though it may be exercised on his behalf by a minister if his name does not appear formally in the treaty. It could therefore have been argued that the Dominion Government was acting on behalf of the King; and it is not doubted that the king could exercise his power on behalf of Canada, though it does not follow that the Dominion Parliament could have given legislative effect to it.

OBEDIENCE TO CONVENTIONS

THESE cases show, however, that the boundary between law—legislation and case law—and convention is wearing very thin, and that even judges are not always certain where it lies. To the lawyer who accepts the thesis that law is something which is *enforced* in courts, there is still a substantial distinction, because though the above examples show that the conventions are *recognised*, there is no court to enforce them. Dicey, for instance, was much puzzled by the fact that though the conventions had no court to enforce them, they were nevertheless obeyed.² He came to the conclusion that where they were obeyed, the reason must be that a breach of

¹ *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326.

² *Law of the Constitution* (8th ed.), Ch. XV.

convention produced ultimately a breach of law. Since the courts enforced the law they would, indirectly, enforce the conventions. He showed that if the convention providing for the yearly meeting of Parliament were not obeyed, the Army and Air Force (Annual) Act would not be passed, so that the Standing Army would become illegal; the financial legislation of the year would not be passed, so that some forms of taxation and some items of expenditure would become illegal. Similarly, if the Ministry refused to resign when it had no majority in the House of Commons and was unable to appeal to the electorate with any success, the same results would follow.

It may be pointed out that this result does not necessarily follow in the second case until a substantial time has elapsed. For when the financial legislation and the Army and Air Force Act have passed the House of Commons, as they do by the beginning of July, that House has no longer any control in this respect until the following April. For nine months, therefore, a ministry may remain in office without breaking the law, though it no longer has the confidence of the House of Commons.¹

CONVENTIONS UNSUPPORTED BY LAW

MOREOVER, it is easy to find conventions which are obeyed just as surely as those which Dicey mentions, although breaches of law would not follow failure to obey them. For example, no breach of law would follow if ten lay peers decided to sit with the law lords while

¹ And there are other means by which they can retain office. Cf. H. J. Laski, *Democracy in Crisis* (1933), Ch. II.

they were deciding an appeal from the Court of Appeal. Perhaps the law lords would refuse to attend, so that the quorum of three of them stipulated by the Appellate Jurisdiction Act of 1876 could not be formed. But it is a little difficult to say that the convention is obeyed, because the law lords would refuse to carry out their public duties if it were not. Again, all the conventions relating to the conduct of business in the House of Commons need not be obeyed: no breach of law would follow if the Government refused to recognise His Majesty's Opposition. So, if Parliament before 1931 had made illegal the manufacture of alcoholic liquor in South Africa, no law would have been broken, but the act would have been a gross breach of convention. If the British Government entered into an offensive and defensive alliance with Japan on behalf of the whole British Empire, Canada would be bound, in spite of the gross breach of convention, but there would be no breach of law. In fact, Dicey's argument applies only to those comparatively few, though important, conventions which determine the relations between the Cabinet and House of Commons.

Nor does it apply to them unless the House of Commons takes objection to the breach of convention. For instance, there is a well-recognised convention that the Cabinet is collectively responsible to the House of Commons.¹ That is, as Lord Melbourne is alleged to have said about the Corn Laws, they must all tell the same story; they must, if necessary, speak on the same side and vote in the same lobby. In 1932, however, the members of the National Government agreed to

¹ See Jennings, *Cabinet Government*, pp. 217-27.

differ, so that some spoke in favour of the majority decision of the Cabinet and some against it; some voted for the Government and others against it, though they were members of it.¹ Here was a clear breach of convention, which induced the Cabinet to follow the unusual course of issuing a public pronouncement indicating that "some modification of usual ministerial practice is required." It was added that "The Cabinet being essentially united in all other matters of policy believe that by this special provision it is best interpreting the will of the nation and the needs of the time."² The decision was attacked in both Houses, but the Government was sustained by large majorities. Consequently there was and could be no breach of law.

LAW AND ENFORCEMENT

THE fallacy of Dicey's argument lies, however, essentially in the view that law is *enforced*. Law generally is enforced and can be enforced only against law-breaking groups and individuals. It cannot be enforced at all against the Government, and most constitutional law as well as most constitutional conventions relate to the Government. The courts themselves do not enforce anything; they do no more than give a decision or make an order. In a civil cause a successful plaintiff has either to approach the court for an order of some kind, or he at once proceeds to enforce the judgment himself, as by levying distraint. In either case, if the defendant proves contumacious,

¹ See *Jennings, Cabinet Government*, pp. 219-21.

² *Ibid.*, p. 220.

the plaintiff has to invoke the assistance of the police. Actually, neither distraint nor execution can be levied against the Crown, as a matter of law. But even if the defendant could be imprisoned, for instance, for contempt of court, it is difficult to believe that a metropolitan policeman under the control of the Home Secretary would arrest the Home Secretary or one of his colleagues in order to put the Home Secretary or one of his colleagues into a prison controlled by the Home Secretary. A legal remedy against the Crown or a minister is useful not because it could be enforced but because it would be obeyed. If the Government decided to break the law, it could not be enforced against them except by revolution; and anything can be enforced against anybody by a successful revolution. In truth, the members of the Government do not know and need not bother to know whether a rule is a matter of law or of convention. If it is proposed to do something, a technical adviser will tell them that it cannot be done, and unless there is urgent reason to the contrary it will not be done. Indeed, it is better that the rule should be law and not convention, for a law may be changed by legislation and a convention is rather difficult to change abruptly. The real question which is presented to a Government is not whether a rule is law or convention, but what the House of Commons will think about it if a certain action is proposed.

REAL DIFFERENCES

It does not follow that it is not important from the technical angle whether a rule is law or convention. There are three differences of some, though not funda-

mental, importance.¹ The first is that when a rule is law it is, generally speaking, the function of the courts to declare that it is broken. There can then be no doubt about it; and the Government must propose legislation to legalise the breach. The second difference is that the rule is either formally expressed or formally illustrated by a decision of a court, whereas conventions arise out of practice, and it is never quite certain at what point practice becomes or ceases to be convention. The third difference is purely psychological. Formal enunciation through the proper constitutional authorities gives a rule of law a greater sanctity than a convention; an Opposition feels that it has a more effective remedy if it can point out that the Government has acted illegally than it would have if it could say only that it had acted unconstitutionally.

The protection against illegal and unconstitutional action is the same. In the case of a Government it lies in the power of the Opposition to use the action as political ammunition. Indeed, "unconstitutional" in this sense covers something more than mere breach of convention; it includes also such interference with the liberty of the subject as is contrary to the traditions of a free people and the principles upon which democratic government must be based. The Government has to justify itself in a House of Commons where, certainly, it has a majority, but where every member holds his seat through popular support, where there is an Opposition to act as the spear-head of every attack, and which is itself imbued with democratic traditions. Few of the Government's actions lose votes in the

For what follows, see Jennings, *Cabinet Government*, pp. 3-5.

House of Commons, though they would if they were serious; but the Government requires votes not merely in the House itself but in the country generally if it is to maintain itself in office. Here as elsewhere the primary protection is the operation of the democratic system, the right of the electorate to choose freely—a right which really means in practice a right to turn out any Government that it does not like.

THE ESTABLISHMENT OF CONVENTIONS

THIS idea that conventions are obeyed because of the political difficulties which follow if they are not, helps us to the solution of the most difficult problem connected with them. When is it possible to say that a convention has been established? Some of them, such as those expressed in resolutions of the Imperial Conferences, are definite and clearly established. But those connected with internal government are more difficult, since they arise by the gradual crystallisation of practice into binding rules. Much the same difficulty arises with the common law. For there may be no legislation and no case law on a point, or the case law may be contradictory; or there may be a general impression in the legal profession that a case was wrongly decided. Nevertheless, such examples are exceptional in respect of legal rules, whereas the problem is the ordinary consequence of the growth of constitutional practice.

MERE PRACTICE IS NOT ENOUGH

It is clear, in the first place, that mere *practice* is insufficient. The fact that an authority has always be

haved in a certain way is no warrant for saying that it ought to behave in that way. But if the authority itself and those connected with it believe that they ought to do so, then the convention does exist. This is the ordinary rule applied to customary law. Practice alone is not enough. It must be normative. For example, the fact that no monarch has refused a dissolution for over a century when advised by his Cabinet does not in itself create a convention that the monarch must always accept the advice tendered. For it is perfectly clear from the *Letters of Queen Victoria* and the *Lives* of statesmen like Lord Lansdowne and Lord Oxford and Asquith that Queen Victoria, King Edward VII, and King George V have throughout the period insisted upon their right to refuse a dissolution, and that the Prime Ministers for the time being, whether Peel, Russell, Palmerston, Gladstone, Disraeli, Salisbury, or Asquith, have approached the monarch on the same understanding. The position is, therefore, that the King has a right to refuse a dissolution, though no doubt he would exercise the right only in exceptional circumstances. The fact that George V granted a dissolution to Mr. MacDonald in 1924 merely indicates that he did not think it convenient to refuse.

A PRECEDENT IS NOT ENOUGH

SIMILARLY, the fact that the King has once behaved in a certain way does not bind him to act in that way. It is sometimes said that the King's choice of Mr. Baldwin in 1922, instead of the Marquis Curzon, created the convention that the Prime Minister must always be in the House of Commons. It certainly did

not if the King did not regard himself as bound by such a rule: and even then it might be that he was mistaken in thinking himself so bound. For neither precedents not dicta are conclusive. Something more must be added. As in the creation of law, the creation of a convention must be due to the reason of the thing, because it accords with the prevailing political philosophy. It helps to make the democratic system operate; it enables the machinery of State to run more smoothly; and if it were not there friction would result. Thus, if a convention continues because it is desirable in the circumstances of the constitution, it must be created for the same reason. We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it. And then, as we have seen, the convention may be broken with impunity.¹

¹ See, further, Jennings, *Cabinet Government*, Ch. I.

CHAPTER IV

PARLIAMENT

§ 1. *The Supremacy of Parliament*

THE THREE PARTIES TO LEGISLATION

THERE are, technically, three parties to Parliament—the King, the House of Lords, and the House of Commons. Under the Parliament Act of 1911, however, legislation may in certain circumstances be enacted without the consent of the House of Lords. A Money Bill as defined in the Act ¹ may become an Act without the approval of that House if it is sent up at least one month before the end of the session, and is not passed by that House without amendment within one month. Any other Public Bill (except a Bill prolonging the duration of Parliament) may become law without the

¹ "A money Bill means a Public Bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects, namely: the imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund, or on money provided by Parliament, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them. In this sub-section the expressions 'taxation,' 'public money,' and 'loan' respectively do not include any taxation, money, or loan raised by local authorities or bodies for local purposes" (Parliament Act, 1911, s. 1 (2)). For a list of Bills certified by the Speakers to be Money Bills (up to 1931) see J. W. Hills and E. A. Fellowes, *The Finance of Government* (1932), pp. 209-10.

consent of the Lords if it is passed by the House of Commons in three successive sessions (whether of the same Parliament or not), and, having been sent up to the House of Lords at least one month before the end of the session, is rejected by the House of Lords in each of these sessions, provided that two years have elapsed between the date of the second reading in the House of Commons in the first of those sessions and the date on which it passes the House of Commons in the third of those sessions.

EFFECTS OF THE PARLIAMENT ACT

IN modern political conditions, circumstances change so rapidly that the second of these provisions is likely to be used rarely. During more than twenty-five years only two Bills have been passed without the consent of the House of Lords. One of these, the Government of Ireland Act, 1914, never came into force, and the other, the Welsh Church Act, 1914, was amended before it took effect. This absence of use may be partly accounted for by the fact that the House of Lords has been in agreement with the House of Commons for most of the period.¹ But it is clear that with all except fundamental constitutional changes two years' delay will be fatal to the success of any measure. On the other hand, the power to pass Money Bills without the consent of the House of Lords is of substantial importance. For most modern legislation involves substantial financial changes. "Money Bill" has been very strictly defined and very strictly

¹ The Coalition Governments, 1915-22; Conservative Governments, 1922-3 and 1924-9; "National" Governments, since 1931.

interpreted. Many Finance Bills, even, have not been certified by the Speaker. Nevertheless, many important changes could be made by Money Bill. In fact, the House of Lords gives but a cursory examination to Financial Bills, since in any case they have, by reason of the privileges of the House of Commons, no power to amend financial clauses.

The result is that in financial matters we have for practical purposes a unicameral legislature. In other matters the representative chamber may have its proposals stultified by an unrepresentative body containing a permanent Conservative majority. Unless radical changes are in the nature of purely financial proposals, they cannot be made. There is, it is true, always the last resource of the Government, the creation of sufficient peers to give a temporary majority in the House of Lords. But the more recent examples of the use of the threat—in order to pass the Reform Act of 1832 and the Parliament Act of 1911—indicate that a monarch will consent to the exercise of this prerogative only under the strictest limitations. Two general elections were necessary in 1910. And it is clear that, now that the House of Commons has the power to override the other House under the Parliament Act, the prerogative is not likely to be used very easily.¹

THE KING'S PART

THE King's part in legislation is now formal only. No monarch since Queen Anne has exercised the power of refusing to assent to a Bill; and it is a recognised convention that the assent must be given. Thus in finan-

¹ See Jennings, *Cabinet Government*, pp. 319-38.

cial matters the House of Commons legislates alone, while in other matters it needs the collaboration of the House of Lords. It will be explained later in this chapter why it is not possible to say that the House of Lords also legislates with the consent of the House of Commons.

THE MEANING OF SUPREMACY

THE dominant characteristic of the British Constitution is, as has previously been emphasised, and as Dicey pointed out,¹ the supremacy or sovereignty of Parliament. This means, in Dicey's words,² that Parliament has the right to make or unmake any law whatever, and that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

The consequence is that not only the courts but everybody in the United Kingdom regard that as binding law which Parliament has enacted. It is not possible for any person to refuse to obey the orders of Parliament because they are not law, though it is possible for him to disobey on the ground that they ought not to be law. Nor is it possible, as it is in some countries, such as the United States and some of the Dominions, for the courts to declare that an Act of Parliament need not be obeyed because it is *ultra vires* or beyond the powers of Parliament. These two assertions, it should be noted, are not the same. For though in most countries the powers of the legislature are limited, it is not necessarily the prerogative of the

¹ *Law of the Constitution* (8th ed.), p. 37.

² *Op. cit.*, p. 38.

courts to refuse to obey legislation. The notion that a court of law could determine the legality of legislation comes from the United States, where the Supreme Court assumed the power of declaring the statutes of Congress to be not applicable because they did not conform with the Constitution.¹ The same power has either been assumed by the courts or provided by the constitutions in Canada, Australia, and Ireland. But many continental countries continue to follow the old principle that excess of legislative authority is a matter between the legislature and the electors. Consequently, the fact that the *courts* do not regard themselves as competent to restrict the exercise of the legislative power is not in itself conclusive of the extent of that power.

THE CONSEQUENCES OF SUPREMACY

DICEY has emphasised the authority which this supremacy of its legislation gives to Parliament.² Under the influence of the King it passed all sorts of fundamental legislation in the reign of Henry VIII: it altered the succession three times, and finally gave the King the power to leave the crown by will, excused the King's debts, abolished the authority of the Pope in the Church of England, and dissolved the monasteries. The powers which it then exercised with the King's consent and authority it claimed to exercise as of right under the Stuarts. Though for a long time it was not clear what its power was, the result of the

¹ *Marbury v. Madison*, 1 Cranch 137. The Privy Council had followed the practice in respect of colonial legislation.

² *Law of the Constitution* (8th ed.), Ch. I.

revolutions was firmly to establish the doctrine that the King in Parliament can do anything. Since then it has settled the crown upon the descendants of Sophia, Electress of Hanover, excluded from the throne all Catholics and all those who marry Catholics, and authorised Edward VIII to abdicate. It has united England, Scotland, and Ireland into a United Kingdom, and given Northern Ireland a form of Home Rule and Southern Ireland Dominion status. The Parliament of 1716 extended its own life for four years; and that of 1911, having first restricted its own life to a total of five years, then prolonged it to a total of eight years. The Parliaments of 1832, 1867, 1884, 1918, and 1928 have totally remodelled the franchise. The Parliament of 1911 curbed the power of the House of Lords and then, in the Defence of the Realm Acts, gave almost dictatorial powers to the King in Council. Since those powers were not ample enough to prevent citizens taking proceedings against the Crown, the Parliament of 1920 passed an Indemnity Act to prevent further proceedings, no matter how illegal the act in respect of which such proceedings were brought. The Parliament of 1931 gave *ex post facto* legality to the illegal refusal of the Bank of England (under the illegal authority of the Cabinet) to convert paper currency into gold; authorised the Government to reduce official salaries, and for this purpose to break contracts made by local authorities; and permitted the Government to set up a new system of administration for certain kinds of unemployment insurance.

Thus Parliament may remodel the British Constitution, prolong its own life, legislate *ex post facto*,

legalise illegalities, provide for individual cases, interfere with contracts and authorise the seizure of property, give dictatorial powers to the Government, dissolve the United Kingdom or the British Empire, introduce communism or socialism or individualism or fascism, entirely without legal restriction.

SOVEREIGNTY

DICEY has called this enormous legal power the "sovereignty" of Parliament. But this is a word of quasi-theological origin which may easily lead us into difficulties. Sovereignty was a doctrine developed at the close of the Middle Ages to advance the cause of the secular State against the claims of the Church. "Sovereignty," said Bodin in 1576, "is supreme power over citizens and subjects unrestrained by the laws." Though the sovereign was bound by divine law and the law of nature, he could within these limits make what laws he liked: and in every community there must be such a sovereign. Developed by Hobbes, Bentham, and Austin, this theory has passed into the current legal theory of England.¹ It appears particularly appropriate to us because it seems to fit the facts of English political institutions.

Yet if sovereignty is supreme power, Parliament is not sovereign. For there are many things, as Dicey² and Laski³ both point out, which Parliament cannot do. "No Parliament," says Professor Laski, "would dare to disfranchise the Roman Catholics or to pro-

¹ See, however, H. J. Laski, *The Grammar of Politics*, Ch. II.

² *Op. cit.*, pp. 69 *et seq.*

³ *Op. cit.*, p. 53.

hibit the existence of trade unions." Parliament is not the permanent and personal sovereign contemplated by Bodin. It consists of two groups of men, of which the members of one will within five years at most cease to have anything to do with Parliament, and who, if they wish to join "the best club in Europe" once again, must offer themselves through a complicated political organisation for re-election by a heterogeneous group of their fellow citizens. Since, if they wish for re-election, they may be called upon to give an account of their actions, they must consider in their actions what the general opinion about them may be. Parliament passes many laws which many people do not want. But it never passes any laws which any substantial section of the population violently dislikes.

LEGAL AND POLITICAL SOVEREIGNTY

THESE considerations made Austin a little doubtful about the seat of sovereignty in England.¹ Dicey felt compelled to draw a distinction between legal sovereignty and political sovereignty.² "Legal sovereignty," he said, "is a merely legal conception, and means simply the power of law-making unrestricted by any legal limit." Whereas "that body is politically sovereign or supreme in a State the will of which is ultimately obeyed by the citizens of the State." Thus Parliament is the legal sovereign and the electors the political sovereign.

If this is so, legal sovereignty is not sovereignty at

¹ *Jurisprudence* (4th ed.), Vol. I, pp. 251-5.

² *Law of the Constitution* (8th ed.), pp. 69-74.

all. It is not supreme power. It is a legal concept, a form of expression which lawyers use to express the relations between Parliament and the courts. It means that the courts will always recognise as law the rules which Parliament makes by legislation; that is, rules made in the customary manner and expressed in the customary form. Unfortunately, Dicey does not use it in this sense when he proceeds to discuss the consequences of the sovereignty of Parliament.¹ He draws two conclusions which are not necessarily true. In the first place, he assimilates all legislative authorities which are not "sovereign" and assumes that the same principles must apply to them, whether they are Dominion legislatures or town councils. And, in the second place, he asserts the principle that, because of its sovereignty, Parliament cannot bind its future action.

"NON-SOVEREIGN" LEGISLATURES

THE basis of the first of these assertions is a clear distinction between sovereign and non-sovereign legislatures. If sovereignty is supreme power, the fundamental problem of constitutional law is to determine its seat. Any legislative powers which are not vested in the "sovereign" must be derived from it. If, therefore, Parliament is truly a "sovereign," it is very different from any legislative body which is not. In this way a town council or a railway company with power to make byelaws may be likened to the United States Congress or the Dominion Parliament of Canada.

¹ Nor when he said in 1913 that the Home Rule Bill threatened to destroy the Sovereignty of Parliament. Cf. *A Fool's Paradise*, pp. 38, 42-3. But what Dicey said in 1913 is not evidence!

But we have seen that Parliament has not supreme power in this sense. It has powers derived from the law. So have the United States Congress, the Dominion Parliament of Canada, the London County Council, and the Southern Railway Company. The question then becomes one of the variety of legislative powers which these bodies possess. And we find that the law treats these bodies very differently. Parliament may pass laws on any subject. The Congress may pass laws of any sort on any subject within the ambit of its powers, and so may every Dominion or colonial legislature in the British Empire. The only function of the courts is to determine whether legislation is within the limits of the powers, and these powers are wide general powers, which may be called powers of government.

Indeed, in modern constitutional law it is frequently said that a Dominion or colonial legislature is "sovereign within its powers." This is, of course, pure nonsense if sovereignty is supreme power, for there are no "powers" of a sovereign body; there is only the unlimited power which sovereignty implies. But if sovereignty is merely a legal phrase for legal authority to pass any sort of laws, it is not entirely ridiculous to say that a legislature is sovereign in respect of certain subjects, for it may then pass any sort of laws on those subjects, but not on any other subjects.

No such phrase is used of local authorities or public utility corporations. They have the strictly limited powers set out in statutes. They have no general law-making powers on certain wide aspects of government.

And in interpreting the powers the courts adopt a very different attitude. They are far more ready to declare an exercise of a power void: they regard as void any exercise of a power which they consider "unreasonable": and there are other rules of interpretation which rigidly limit the law-making capacity of the authority. In law there is no comparison between the Parliament of Canada and the London County Council. Decisions applying to the one cannot be used to explain the law applying to the other. Dicey's comparison is, as a matter of law, entirely beside the point.

LIMITATION OF A SOVEREIGN POWER

THE same cause produces the second principle. "A sovereign power cannot, while retaining its sovereign character, restrict its own powers by any particular enactment," says Dicey,¹ repeating the sense of a proposition which Bodin himself had laid down. This is a perfectly correct deduction from the nature of a supreme power. If a prince has supreme power, and continues to have supreme power, he can do anything, even to the extent of undoing the things which he had previously done. If he grants a constitution, binding himself not to make laws except with the consent of an elected legislature, he has power immediately afterwards to abolish the legislature without its consent and to continue legislating by his personal decree.

But if the prince has not supreme power, but the rule is that the courts accept as law that which is made

¹ *Law of the Constitution* (8th éd.), p. 66. It is worth noting that this passage is not in the early editions: compare 2nd éd., p. 63; but see 4th éd., p. 65.

in the proper legal form, the result is different. For when the prince enacts that henceforth no rule shall be law unless it is enacted by him with the consent of the legislature, the law has been altered, and the courts will not admit as law any rule which is not made in that form. Consequently a rule subsequently made by the prince alone abolishing the legislature is not law, for the legislature has not consented to it, and the rule has not been enacted according to the manner and form required by the law for the time being.

The difference is this. In the one case there is sovereignty. In the other, the courts have no concern with sovereignty, but only with the established law. "Legal sovereignty" is merely a name indicating that the legislature has for the time being power to make laws of any kind in the manner required by the law. That is, a rule expressed to be made by the King, "with the advice and consent of the Lords spiritual and temporal, and Commons in this present Parliament assembled, and by the authority of the same," will be recognised by the courts, *including a rule which alters this law itself*. If this is so, the "legal sovereign" may impose legal limitations upon itself, because its power to change the law includes the power to change the law affecting itself.

This may be illustrated by a recent decision of the Judicial Committee of the Privy Council.¹ By section 5 of the Colonial Laws Validity Act, 1865:

"every Representative Legislature shall, in respect to the Colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the

¹ *Attorney-General for New South Wales v. Trethowan*, [1932] A.C. 526.

Constitution, Power, and Procedure of such Legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial law for the time being in force in the said colony."

The legislature of New South Wales is such a legislature, so that among its powers is the capacity to alter its powers in the manner and form required by the law for the time being in force. In 1929 it passed an Act providing that no Bill for abolishing the Legislative Council should be presented for the royal assent until it had been approved at a referendum by a majority of the votes cast by the electors, and that the same rule should apply to a Bill amending that Act. In 1930 two Bills were passed. The one proposed to repeal the Act of 1929 and the other to abolish the Legislative Council. Neither was submitted to the electors; and accordingly proceedings were taken to prevent the submission of these Bills for the royal assent. The Judicial Committee decided that the Act of 1929 provided the "manner and form" which were to be followed in respect of any Bill of the kind mentioned in that Act, and gave the remedy sought.

THE SUPREMACY OF PARLIAMENT COMES FROM THE LAW

THE powers of Parliament are not expressed in an Act of Parliament. Nevertheless it is admitted, as Dicey admits, that the powers do come from the law. The law is that Parliament may make any law in the manner and form provided by the law. That manner and form is provided, at present, either by the common law or by the Parliament Act of 1911. But Parliament

may, if it pleases, provide another manner and form. Suppose, for instance, that the present Parliament enacted that the House of Lords should not be abolished except after a majority of electors had expressly agreed to it, and that no Act repealing that Act should be passed except after a similar referendum. There is no law to appeal to except that Act. The Act provides a new manner and form which must be followed unless it can be said that at the time of its passing that Act was void or of no effect.

LEGISLATION BINDING THE DOMINIONS

THIS is no hypothetical problem, for we have something of the sort in section 4 of the Statute of Westminster, 1931. It provides:

“No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.”

Thus the law in 1930 was that Parliament could legislate for a Dominion in the customary form. The law to-day is that Parliament can legislate for a Dominion only provided that the declaration mentioned is made part of the Act. The “manner and form” of the legislation has been altered. It was strictly followed in His Majesty’s Declaration of Abdication Act, 1936, the only Act since 1931 applying to a Dominion (Canada) to which section 4 applied.

It is not possible to rebut this argument except by saying that this provision is void. The power of

Parliament given by law, it must be said, is not a power to pass any legislation whatever, but a power to pass any legislation which does not limit its own authority. Since this is a matter of common law, this must be proved by decisions of the courts. No such proof can be offered ¹ (though for that matter no such proof can be offered that the other is the correct interpretation). There are, however, certain *Parliamentary* precedents quoted by Dicey ² which suggest that it may be correct.

PARLIAMENTARY PRECEDENTS

FIRST, there is the Act of Henry VIII's reign which provided that a statute made during the minority of a king should not bind the King unless he confirmed it when he came of age. Yet the first statute of Edward VI's reign repealed that Act. The answer is simple, namely, that the rules as to the power of Parliament had not yet been settled, and that in any case the statute did not bind the King, since he could have repudiated it and all statutes passed after it if he had reached full age.

Secondly, the Union with Scotland Act, 1706, had certain provisions which are expressed to continue "for ever." Yet some of them have been repealed. In particular, an Act of the Parliament of Scotland is ratified by the Union Act and is declared to be "an essential and fundamental part." It provides, among other things, that the universities and colleges of Scotland, as then established by law, should continue within that kingdom for ever; and that the professors

¹ But see now a *dictum* in *British Coal Corporation v. The King*, [1935] A.C. 500, quoted *post*, p. 148.

² *Law of the Constitution* (8th ed.), pp. 62-5.

should subscribe to the confession of faith there set out. Further, it enacts "that this Act of Parliament . . . shall be held and observed in all time coming as a fundamental and essential condition of the union to be concluded betwixt the two kingdoms, without any alteration thereof or derogation thereto in any sort, for ever." Yet the law relating to the universities has been altered, and the professors have been relieved from the necessity of making the declaration of faith.

Thirdly, the Union with Ireland Act, 1800, confirmed the articles of union between Great Britain and Ireland, which contained the following provision:

"that the Churches of England and Ireland as now by law established, be united into one protestant episcopal Church, to be called ["The United Church of England and Ireland"] and that the doctrine, worship, discipline, and government of the said united church shall be and shall remain in full force for ever, as the same are now by law established for the Church of England; and that the continuance and preservation of the said united church, as the established Church of England and Ireland, shall be deemed and taken to be an essential and fundamental part of the union."

Yet the Irish Church Act, 1869, disestablished the Church of Ireland.

These precedents, like most precedents, can be explained away. It can be said that the fact that Parliament has, by repealing these provisions, exceeded its powers, is no authority for asserting that it cannot bind itself. Or it may be said that these provisions relate to the subject-matter and not to the method of legislation. But these explanations indicate a desire rather to make the facts fit the rule than to draw the

rule from the facts. Probably, therefore, the courts would hold that section 4 of the Statute of Westminster is void, except as an expression of intention by the Parliament of the United Kingdom.¹ Indeed, the statement of the convention in the preamble, already referred to,² shows that some members of the Conference on the Operation of Dominion Legislation were doubtful of the legal validity of the express enactment.³ Nevertheless, this does not follow from the "sovereignty" of Parliament, but from the relations between Parliament and the courts; or, in other words, it follows from the law, not the law from the doctrine. And in any case the interpretation is doubtful: the problem cannot be settled by an airy reference to the "sovereignty" of Parliament.⁴

§ 2. *Limitations upon Parliamentary Authority*

MEANING OF PARLIAMENTARY SUPREMACY

PARLIAMENTARY supremacy means essentially two things. It means, first, that Parliament can legally

¹ "It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired; indeed the Imperial Parliament could, as a matter of abstract law, repeal or disregard section 4 of the Statute. But that is theory and has no relation to realities." *British Coal Corporation v. The King*, [1935] A.C. 500, at p. 520.

² *Ante*, p. 96.

³ This is made abundantly clear by the Report (Cmd. 3479, pp. 19-20). The statutory provision is inserted because "practical considerations affecting both the drafting of Bills and the interpretation of Statutes make it desirable that this principle should also be expressed in the enacting part of the Act."

⁴ Because of this difficulty, I have spoken of the "supremacy" of Parliament. This word, though not better than sovereignty, is not associated with politico-theological dogmas.

enact legislation dealing with any subject-matter whatever. There are no limitations except political expediency and constitutional conventions. De Lolme's remark that Parliament can do anything except make a man into a woman and a woman into a man is often quoted. But, like many of the remarks which De Lolme made, it is wrong. For if Parliament enacted that all men should be women, they would be women so far as the law is concerned. In speaking of the power of Parliament, we are dealing with legal principles, not with facts. Though it is true that Parliament cannot in fact change the course of nature, it is equally true that it cannot in fact do all sorts of things. The supremacy of Parliament is a legal fiction, and legal fiction can assume anything.

Parliamentary supremacy means, secondly, that Parliament can legislate for all persons and all places. If it enacts that smoking in the streets of Paris is an offence, then it is an offence. Naturally, it is an offence by English law and not by French law, and therefore it would be regarded as an offence only by those who paid attention to English law. The Paris police would not at once begin arresting all smokers, nor would French criminal courts begin inflicting punishments upon them. But if any Frenchman came into any place where attention was paid to English law, proceedings might be taken against him. If, for instance, a Frenchman who had smoked in the streets of Paris spent a few hours in Folkestone, he might be brought before a court of summary jurisdiction for having committed an offence against English law.¹

¹ Provided that the court had been given jurisdiction by the statute.

LEGISLATION CHANGING FOREIGN LAW

WE have taken an absurd example, but it does illustrate the assertion that Parliamentary supremacy is only a legal principle, and that it cannot change the law applied by a foreign court. At the same time, it is not only English law which can be changed. For Parliament is not only a legislature for England; it has powers over the whole British Empire, subject to the limitations (if there be any) contained in section 4 of the Statute of Westminster, 1931.¹ It can legislate so as to alter the law of any part of the United Kingdom, of any Dominion, of British India, and of any colony. Also, since British courts outside the British Empire will obey its commands, it can legislate so as to alter the law applied by British courts in the native States of India, in British protectorates, and in any other country where British courts are established.

These various laws, too, are not limited to acts done in the territories specified. For example, it is an offence, against English law, punishable in the English courts, for any person who has married in England to go through a ceremony of marriage anywhere while the first marriage subsists. Consequently a British subject (at least) may be punished in an English court for bigamy committed in the United States.² Such "extra-territorial" legislation, applying to acts done outside the territory of the legislative authority, is quite common; and powers for the enactment of extra-

¹ *Ante*, pp. 145-8.

² *Earl Russell's Case*, [1901] A.C. 446.

territorial legislation are now possessed by the legislatures of the Dominions.¹

Thus Parliament can legislate for any acts done by any persons anywhere, but it cannot do more than change those systems of law which recognise its authority. It can deal with acts done by French citizens in France, but it cannot alter French law for the plain and obvious reason that French law does not recognise its authority, though English law does recognise its power to change French law.²

CONVENTIONAL LIMITATIONS IN REGARD TO THE DOMINIONS

THOUGH Parliament legally may legislate for the Dominions (subject to section 4 of the Statute of Westminster), its power is rigidly limited by constitutional conventions. Two of these have already been quoted,³ since they are incorporated in the preamble of the Statute of Westminster. Parliament must not legislate for a Dominion except with the consent of that Dominion; and in particular it must not alter the succession to the throne or the royal style and titles without the assent of the Parliaments of all the Dominions.

¹ Statute of Westminster, 1931, s. 3: but this does not apply to Australia, New Zealand, and Newfoundland until after the adoption of the section by the respective legislatures: *ibid.* s. 10.

² Sometimes, under the rules of private international law, French law is applied by a British court. Then, of course, the British court would apply French law modified by the British legislation. For it is English law which prescribes the application of French law; and by *English law* Parliament can change French law. Actually it is difficult to imagine Parliament pretending to change French law; what it would do would be to order the courts not to apply French law on certain points, but to apply the specially enacted rules.

³ *Ante*, p. 96.

The sort of legislation which is possible (with the consent of the Dominion) is indicated by the two kinds of legislation which have been enacted since 1911. In the first place, there has been constitutional legislation which the Dominions have not been competent to enact. The Statute of Westminster itself is the most obvious example. It was drafted by an Imperial Conference, and enacted by Parliament after resolutions approving it had been passed by the Dominion Parliaments. But such statutes may apply to particular Dominions. The British North America Act, 1867, which contains the Constitution of the Dominion of Canada, has been amended at the request of the Dominion and of the Provinces of Canada. For the Act provides a quasi-federal division of powers, and only the Parliament of the United Kingdom is competent to modify it. Similarly the "Articles of Agreement for a Treaty between Great Britain and Ireland," which formed part of the fundamental law of the Irish Free State, were amended by identical legislation by the Oireachtas (the legislature of the Irish Free State) and by the Parliament of the United Kingdom.

Secondly, Parliament has enacted legislation of common interest which may be incorporated into Dominion law by local legislation. Examples are the Copyright Act of 1911, the Bankruptcy Act of 1914, and the British Nationality and Status of Aliens Act, 1914. These were all enacted at the suggestion of the Imperial Conference of 1911. They enable Dominion citizens to secure the advantage of British copyright, permit the reciprocal enforcement of bankruptcy adjudications, and give power to a Dominion Govern-

ment to naturalise persons as British subjects. The last of the three also contains a statutory definition of natural-born British subjects which applies to the whole Empire; for all natural-born Dominion citizens are also British subjects. There has been no such legislation since 1914; and though the convention stated in the preamble to the Statute of Westminster leaves open the possibility of further examples, common action is more likely to be brought about in future by reciprocal legislation.¹

OTHER RESPONSIBLE LEGISLATURES

WE have mentioned the Dominions only. But this convention, though expressed in the Statute only in respect of the Dominions, in fact applies to all responsible Governments in the Empire. With certain qualifications, Southern Rhodesia has as large a power of legislation as the Dominions. It would be contrary to constitutional conventions for Parliament to legislate for it in respect of any matter in which its own legislation were competent. Similarly Northern Ireland has a legislature with limited powers. Parliament can legislate so as to define those powers more closely² or to extend them. But it would be unconstitutional for Parliament to exercise its legal power of legislation in the matters delegated to the Parliament of Northern Ireland, except with the consent of that Parliament. This, indeed, was the only reason for the acceptance by the Ulster leaders of the new system established by

¹ There has been minor legislation for Australia at the request of Australia. The Constitution of Newfoundland has been suspended by Imperial Act, at the request of Newfoundland.

² Cf. Northern Ireland (Miscellaneous Provisions) Act, 1932.

the Government of Ireland Act, 1920. For they feared incorporation in a united Ireland under a Parliament dominated by the Southern Irish. They knew that the only way to prevent legislation setting up such a Parliament was to have a legislature of their own. They could not then be brought under an all-Irish Parliament except with their own consent.

INTERNATIONAL LAW

PARLIAMENT is further limited in practice by the rules of international law. It is commonly said that "international law is part of the law of England." But this means only that the law of England is presumed not to be contrary to international law. Consequently, if there is any doubt about the meaning of a statute, the courts will give it that meaning which is most consistent with international law. They will not assume, for instance, that a statute is to apply to acts done by foreigners outside British territory.¹ Nor will they readily assume that their jurisdiction extends to the High Seas.² Also, while they will assume that the King has the powers which may be exercised by a Government under the rules of international law,³ they will also assume that he has not the powers whose exercise would be contrary to international law.⁴ Nevertheless, the function of the courts is to apply

¹ *Lopez v. Burslem* (1843), 4 Moo. P.C. 300; *The Amalia* (1863), 1 Moo. P.C. (N.S.) 471.

² *R. v. Keyn*, (1876) 2 Ex.D. 160.

³ *Commercial and Estates Co. of Egypt v. Board of Trade*, [1925] 1 K.B. 271; see my article, "The Right of Angary," 3 *Cambridge Law Journal*, pp. 49-58.

⁴ *West Rand Gold Mining Co. v. Rex*, [1905] 2 K.B. 391.

English law, not international law. If, therefore, the law of England is contrary to international law, they will apply the former.¹

¹ Cf. Brett L.J. in *Niboyet v. Niboyet*, (1879) 4 P.D. 1, at p. 20.

Professor H. Lauterpacht, the learned editor of Oppenheim, *International Law* (5th ed.), Vol. I, p. 36, has stated that customary international law is part of the common law. If this means only that the courts will presume that the two systems are not contradictory, I have no criticism to offer; but if it means that whatever is accepted customary international law is *per se* part of the common law, so that a modern rule of international law overrides principles already established by decisions of the courts, it cannot, in my opinion, be accepted. No question arises about Prize Courts; they are Admiralty courts whose function it is to apply international law and not the common law itself; but the function of the other courts is to apply the law of England, statute law where it exists, and common law based upon existing principles where there is no legislation applicable. Where the common law has not been "settled," i.e. where there are no precedents, the courts will, if they can, apply the rules of international law. This means that if international law gives a State a right on behalf of a subject, the courts will assume that the common law gives the right to the subject; and if international law gives a right to the United Kingdom, the courts will assume that the Crown has the right according to common law. In neither case will this be so if it is clear that neither right exists at common law.

The cases quoted by Professor Lauterpacht do not, it is submitted, support his contention. The following will indicate the attitude of the courts. *Viveash v. Becker* (1814), 3 M. & S. 284, was a case on the Act 7 Anne, c. 12, an Act which has been stated to be "declaratory of the common law and of the law of nations." It was in fact passed to give effect to what was understood to be international law, and it must therefore be interpreted in the light of international law. *De Wütz v. Hendricks* (1824), 2 Bing. 314, decided that a right of action did not lie because it was contrary to the law of nations; there was no previous decision, and so it was assumed to be part of the common law. *Emperor of Austria v. Day and Kossuth* (1861), 2 Giff. 628, involved the question whether an injunction could be issued to restrain the printing of notes for revolutionaries in another country. The forgery of the currency of another country was felony under 11 Geo. 4 & 1 Will. 4, c. 66, which was declared to be in accordance with international law, and it was therefore held that the remedy could be given. *R. v. Keyn* (*sup.*) was decided by thirteen judges, of whom seven held that the Central

Criminal Court had no jurisdiction over territorial waters, and six that it had. Of the majority, five said that the court had no jurisdiction (a) because the United Kingdom had no jurisdiction according to international law, (b) because the court had no jurisdiction according to statute and common law. One said the question was one of common law and statute law only, and the court had no jurisdiction; and one said that as the United Kingdom had no jurisdiction according to international law it was unnecessary to determine whether the court had jurisdiction by common law or statute law. Five of the majority (a sixth agreeing) said that even if there were such a rule in international law, legislation would be required to give the court jurisdiction. One of the minority decided purely as a question of common law that the court had jurisdiction, and the other five minority judges said that there was such a rule in international law and it must be presumed to be a rule of common law, there being no legislation or decision to the contrary. In *West Rand Central Gold Mining Co. v. The King*, [1905] 2 K.B. 391, it was certainly said: "It is quite true that whatever has received the common consent of civilised nations must have received the assent of our country, and that to which we have assented along with other nations may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals to decide questions on which doctrines of international law may be relevant." It was agreed also that the proposition that international law is part of English law is correct if international law be understood in the sense of accepted principles. But it is clear that by this was meant only that if there was an accepted principle, the courts would give effect to it if they could. The opinions of text-writers that a conquering State was liable for the obligations of the conquered State were rejected not because they were contrary to international law (a question not discussed), but because they were contrary to principles of English law laid down in cases like *Campbell v. Hall*, Cowp. 204. Such opinions will not be regarded as part of English law "upon a question as to which there is no evidence that Great Britain has assented, and *a fortiori* if they are contrary to the principles of her laws as declared by her courts." The case was decided on the ground, well settled in the cases, that a petition of right cannot be brought in respect of an act of State—i.e. an act done on behalf of the Crown outside British territory—and it is submitted that the result would have been the same even if it could be proved that in the past the British Government had always recognised the obligation or that there was a clear rule of international law.

It is obvious enough that even if there were no legislation on the subject and international law allowed it, the Crown could not tax a

At the same time, any breach of international law by the United Kingdom will give to the country injured a claim against this country which may be enforced by any means available by international law for the time being (such as consideration of the matter by the Council or Assembly of the League of Nations or by the Permanent Court of International Justice, or even, subject to the Kellogg Pact, war). This means that the United Kingdom, through legislation enacted by Parliament, may be liable to give redress to a foreign Power. This does not impose any legal obligation upon Parliament. But it means in fact that Parliament will not deliberately, and ought not to, pass any legislation which will result in a breach of international law. Consequently international law limits the power of Parliament through the operation of a constitutional convention.

“THE MANDATE”

THERE is, too, a convention which limits the power of Parliament in respect of internal matters.¹ Apart altogether from political expediency, it is now recognised that fundamental changes of policy must not be effected unless they have been in issue at a general election. This appears as a limitation upon the Government. But since the Government, as I shall explain presently, controls Parliament, it is a limitation upon Parliament itself.

foreigner, or imprison him without writ of habeas corpus in time of peace, or deny him access to the courts, or prevent him from attending a public meeting, or do anything else which was clearly contrary to the common law.

¹ See Jennings, *Cabinet Government*, pp. 152, 320, 388-90.

The origin of this convention may be traced to the renouncing by the Conservative Party after the general election of 1852 of the policy of protection for agriculture. But it cannot be said to be a convention until the present century. It was because they alleged that the Liberal Party had no "mandate" from the electors for the policy embodied in the Budget of 1909 that the Conservative peers were able to attempt the justification of their rejection of the Finance Bill of that year. The Liberal Party then sought a "mandate" both for the Budget and for the "clipping of the wings" of the House of Lords. The mandate having been secured for the former, the House of Lords passed the Finance (1909-10) Bill in 1910. Another election was held to secure a mandate for the Parliament Bill, and the King authorised the creation of enough peers to pass the Bill through the House of Lords, though the mere threat proved sufficient.

In 1923 the Conservative Government decided that a policy for the protection of industry by tariffs was necessary to restore the prosperity of Great Britain. But since their Party had fought shy of the question since the decisive defeat of 1906, they considered that a new election was necessary. A majority pledged to free trade was returned, and the leaders of the Labour Party, with the support of the Liberals, took office. Accordingly, at the general election of 1924, the Conservative Party formally renounced the policy of placing tariffs on food and raw materials, and the Conservative Government of 1924-9 did not attempt to impose them. After the formation of the "National" Government in 1931, however, the Con-

servative Party again announced that tariffs were the only remedy available for restoring prosperity. The other members of the Cabinet agreed to consider any remedy that might appear desirable for "restoring the balance of trade." The Conservatives at the election of 1931 made perfectly plain that their remedy was tariffs. Accordingly, when the Government secured an enormous majority, made up largely of Conservative members, the Cabinet "considered" the available measures and proposed a policy of tariffs, though giving the Liberal Cabinet ministers liberty to differ and to vote against the proposals in the House of Commons. The Government had secured its "mandate" and so was able to reverse the policy of the country.

If we add that the Labour Governments of 1924 and 1929 did not introduce socialist legislation because they had no mandate, while the general election of 1918 was fought on the policy of hanging the Kaiser, taking action against the other German "criminals," and extorting "the uttermost farthing" from our late enemies, we see that every election since 1910 has been fought on the assumption that the Party placed in power would have a "mandate" to introduce the policy for which it had contended.

It is not a matter of deducing the convention from the precedents, for the accusation that "the Government has no mandate" is one of the commonest allegations of an Opposition. There is, too, a reason for it. It establishes that in major issues the policy of the country shall be changed only after a definite expression of the opinion of the electorate at a general election. General

policies are all that can reasonably be submitted to the voter. Within their ambit Parliament may constitutionally legislate as it pleases. Nor can any general issue be submitted unless it is so important that it is debated in every constituency in England. At the present time, for example, the opinion of the electors on the demand for Home Rule for Scotland cannot be taken, because in only a small proportion of constituencies is it likely even to be mentioned. The contrary was true of the demand for Home Rule for Ireland in 1885 and 1892.

Nor is the convention limited to the United Kingdom. President de Valera declared in 1932 that the Dáil could not deal with the question of separation from the British Commonwealth of Nations because, though his Government had a mandate for removing the oath from the Constitution and for suspending the payment of the land annuities, it had no mandate to create a republic.

§ 3. *The Control of Parliament*

CONTROL BY THE KING

THE Cabinet system was developed to enable the King to control Parliament. William III relied upon Whig ministers partly because the Whigs had been mainly instrumental in providing him with a throne, and partly because the great Whig families dominated both Houses of Parliament. Anne varied the proportion of Whigs and Tories according to fluctuations of personal power. George II accepted Walpole's resignation as soon as he no longer commanded the necessary support in the House of Commons. George III was compelled

to allow Lord North to resign, and had forced upon him first the short-lived Rockingham Ministry and then the "Unnatural Coalition" of Fox and North. William Pitt was able to remain in power because he was able to secure a majority in the House of Commons.

It is true that during a substantial part of the eighteenth century the Cabinet—or rather its members, for it had no personality of its own—was able to control the monarch. Marlborough was able to rule through Godolphin so long as his Duchess had the Queen's ear. Harley secured authority as soon as Mrs. Masham became the favourite. Walpole had almost complete control over internal affairs, partly because the first two Georges were not interested in them, and partly because he used the influence of queens and mistresses to that end. William Pitt, who owed his accession to power only to the King's support, came to dominate the aged and partly insane monarch.

CONTROL BY THE CABINET

WITH the nineteenth century the Cabinet became at once more homogeneous and more powerful. George IV and William IV might still exercise great influence. "The first official act of George IV was to send for the Foxite Whigs. Only because of his death was the Reform Government possible in 1830. The death of William IV prolonged for four years a ministry which would have expired long before if he had lived."¹ But certainly after the accession of Victoria the policy of the country was that of the Cabinet, and the Cabinet

¹ Jennings, "Cabinet Government at the Accession of Queen Victoria," *Economica*, 1932, p. 63.

existed because it could command a majority in the House of Commons. The strange experiment of William IV in 1834 failed because Peel could not control the House of Commons. The dissolution did not give him the majority which he expected, and Lord John Russell turned him out when he thought fit. It is true that "the Bedchamber Plot" in 1839 kept in the Whigs and kept out the Tories because the Queen objected to changing her ladies. But this was only because neither Party had a majority upon which it could rely. When Peel obtained his vast majority in 1841 there was no longer any doubt that the Tories had to come in. After that, the Cabinet resigned as soon as it had lost its majority. Disraeli with his customary realism correctly estimated the nature of the new Constitution when, after the defeat of his Party at the general election of 1868, he resigned without meeting Parliament. It is useless for a Cabinet to remain in office if it has lost its majority.

THE MEANS OF CABINET CONTROL

It is commonly asserted that the Cabinet system enables Parliament to control the Government. That may be true of France, where any Government is necessarily a Coalition, and where real deference is shown to the opinions of the committees of the legislature. It is not true in the United Kingdom. The Cabinet, or a Department under the control of the Cabinet, formulates the policy, and Parliament must either accept the policy or risk a dissolution.¹

Under the two-party system this is obvious, at least

¹ See Jennings, *Cabinet Government*, Ch. XIV.

so far as the House of Commons is concerned. The Cabinet contains the leaders of the Party having the majority in the House of Commons. It places the policy before the House and expects the Party to vote in its favour. If the Party does as it is told, the Cabinet's majority is assured. No matter what the Opposition may say or do, the policy is definitely determined and cannot be overridden. For not only can the Government be certain of a majority for its legislative proposals, but also it can control the procedure of the House in order to pass the legislation in its own way and at its own time. The Standing Orders give great preference to Government business. From the beginning of the session until about Easter, Government business has precedence on all days except Wednesdays and Fridays. From just before Easter until Whitsuntide, Government business has precedence on all days except Fridays; and from Whitsuntide or thereabouts until the end of the session the Government occupies the whole time of the House.

THE INFLUENCE OF PRIVATE MEMBERS

It is true that matters can be discussed in various ways at the instance of private members. A question can be asked on any subject, though it need not be answered. Any member can move the adjournment of the House to discuss any definite matter of urgent public importance. If the Speaker thinks fit and forty members support him, a debate takes place the same evening. But the Government can use its majority to secure a favourable verdict. When the House is about to go into committee on the Civil Estimates, the Army

Estimates, and the Navy Estimates, any matter relevant to those Estimates may be debated in the House. When any individual vote is discussed in committee, the service for which the vote is proposed may be discussed. By convention, too, it is the Opposition which determines what votes are discussed. But at the end of the debate the Whips are put on, and the Government majority votes in its favour. Also, only twenty days are available for discussing all the Estimates, so that the number of subjects debated is limited, and the longer the debate the fewer of them there are to debate. By convention, again, the Government gives precedence for a vote of censure by the Opposition, but the Government majority determines the result.

CONTROL OF THE GOVERNMENT

YET even these rights of the Opposition may be swept away by the Government. For the Standing Orders may be suspended or altered by a majority vote. It is not uncommon for the Government to move to suspend some Standing Orders, in order that it may take all the time of the House; and the Government majority passes the motion. The extent of debate upon legislation and the result of the debate are similarly determined by the Government. Though under Standing Orders a Bill may be debated on its introduction, on second reading, on the financial resolution and the report of the financial resolution (if there is one), in committee, on the report stage, and on third reading, and these normally take place on different days, the Government majority can suspend Standing Orders so as to take all the steps on the same day. A "guillo-

tine resolution" may be moved by the Government and passed by the Government majority to determine the times at which the votes must be taken; and the majority supports the Government on these votes. Also, if a minister moves the closure of any debate, and the Speaker or Chairman accepts the motion, the majority vote brings the debate to an end. Bills introduced by private members can be rejected or passed, as the Government thinks fit, by the use of its majority.

Thus a Government backed by its majority can determine what legislation shall be debated, for how long it shall be debated, and what the result of the debate shall be. Naturally it does not exercise its powers too stringently, for the House dislikes to feel "the whip" too much. Ministers try to persuade, rather than to coerce, the House to adopt their timetable. Moreover, the fact that the Government has the power enables it to make agreements with the Opposition leaders, so that a reasonable amount of business is done with a reasonable amount of criticism.¹

THE IMPORTANCE OF THE PREROGATIVE OF DISSOLUTION

THE Government can be defeated only by the defection of a sufficient number of members of its own Party. But nearly every question is now treated as one of confidence. The result of a defeat will then be one of two alternatives. Either the Government will resign and the Opposition come into power—a result which the dominant Party *ex hypothesi* does not want. Or the

¹ E.g. "You can move your vote of censure on us on Thursday, provided that you let us pass this Bill on Tuesday."

Government will advise the King to dissolve Parliament. Whatever the constitutional powers of the King may be, it is quite certain that in normal times he could not refuse to dissolve Parliament when a Government loses its majority. The result is that every member has to seek re-election. This involves the individual member in considerable trouble, and may involve him in much expense. An election costs a candidate, on an average, £800. This amount may be forthcoming from some outside body, such as a trade union. Or it may be raised in the constituency. But in a great many cases it falls on the candidate himself. Moreover, the retiring member may lose his seat, especially if he belongs to the Government Party and the Cabinet has already met the unpopularity which ultimately faces all Governments. Indeed, if the member voted against the Government, he probably will lose his seat. For he may not receive official recognition from the Party; and even if he secures the support of his local Party, there will be former supporters who disagreed with his action, and there may even be a rival candidate from his own Party.

Governments with majorities have been defeated in the House of Commons, but such defeats are very rare. Gladstone's Government was defeated on the issue of Home Rule in 1886, but it had never had a majority on that issue, and the last occasion on which it could really be said that the House of Commons ejected a Government in the majority was in 1866. Normally it is not the House of Commons but the electorate which determines the fates of Cabinets who have advised dissolution because they thought the

time favourable or because the term of Parliament was coming to an end.

THE HOUSE OF LORDS

THE Government may not have the same control of the House of Lords. If it is a "progressive" Government, it is necessarily in a minority in that House. The Peers may therefore reject or mutilate Government measures with impunity; the Liberal Government of 1906-11 was said to "plough the sands" because the Peers rejected so many Bills.¹ They now possess little control over financial legislation, but the Parliament Act is of little use for Bills other than Money Bills. At the same time, the Peers cannot do more than obstruct. Any proposals which they put forward must receive the approval of the House of Commons; and the Government with a majority controls that House. With a Conservative Government, the Peers do little except register approval. Only the active members take part in the proceedings of the House, and they are as little likely to obstruct as the majority of the Lower House. The essential function of the House of Lords is to debate matters of policy which do not require legislation, and to make or accept technical amendments in Bills.

CONTROL UNDER THE THREE-PARTY SYSTEM

It might be thought that, with three or more Parties, none of which has a majority, conditions would be very different. If a Coalition is formed, then the system

¹ Spender and Asquith, *Life of Lord Oxford and Asquith*, Vol. I, Ch. XIV.

works as before, except that a Coalition is more likely to split than a homogeneous Party. But even without a Coalition the Government is in a very strong position. It usually does not regard every vote as a matter of confidence, as Mr. MacDonald announced in 1924. But it can still carry its major proposals. For it has the prerogative of dissolution at its command. No doubt the King is more reluctant to grant a dissolution, since another Government might be possible. But the fact that he granted a dissolution to Mr. MacDonald in 1924 shows that he would refuse only in very exceptional circumstances.

Moreover, a dissolution is an even more effective remedy with a minority Government. The position of a third Party, which first supports a Government and then turns it out, is very weak. The electors prefer to say yea or nay, not yea and nay. If they support the Government they vote for it; if they do not, they support the Opposition. The third Party therefore stands to lose by a dissolution much of the support which it had before, as the Liberal Party lost support in 1924.¹ The Liberal Party in 1929-31 disliked the Labour Government, but it would have disliked a Conservative Government still more. As it did not want a dissolution, it had to support the Government, hoping by extra-Parliamentary action to "Liberalise" its measures.

The result is that, though the composition of the House of Commons determines the nature of the

¹ This did not apply to the old Nationalist Party, since it consistently had one policy, and was prepared to support any Government only so long as it accepted that policy.

Government, the Government controls the House of Commons and, therefore, the action of Parliament. The supremacy of Parliament means a strong executive, capable of taking decisions and, within the limits of political expediency, forcing them upon the country. The attitude of the average elector illustrates this clearly. He rarely makes up his mind upon the nature of a policy. He is content to allow the Government to continue with it until he sees the result. When he sees the consequences, or what he thinks to be the consequences, he votes accordingly. The truth is that the average elector in Great Britain has not made up his mind on the desirability of socialism, tariffs, "economy," or anything else. If the policy does not produce what he wants, he votes against the Government. The Government does in truth govern, and the function of Parliament is first to register its decisions, secondly to serve as an outlet for individual and collective grievances, and thirdly to warn a Government when it is becoming unpopular.

CHAPTER V

THE ADMINISTRATION

§ 1. *The Administration and Administrative Powers*

THE APPLICATION OF GENERAL RULES

THOUGH no legal limitation prevents Parliament from legislating for individuals, it is obvious that legislation for the forty-five million inhabitants of Great Britain—not to speak of the four hundred millions in the rest of the Empire—can rarely take any form except that of general rules. Someone, therefore, has to apply the general rules to individual cases. So far as the rules relate to the conduct of the ordinary individual, and so far as the ordinary individual knows about them, he applies them to himself. He keeps his contracts, he refrains from committing torts, and he does his best not to commit crimes. If he does not do as he ought, or if the application of the rule is doubtful, the courts are open to the person aggrieved. And if the individual refuses reparation for a wrong, or if he is found committing a crime, there are executive officers—police-men, sheriffs, and bailiffs—whose function it is to put constraint upon him under the control of the courts.

POLICE FUNCTIONS AND EXTERNAL FUNCTIONS

THESE police functions, together with the conduct of foreign affairs, the government of the colonies, the maintenance of the armed forces, and the levying of

what we should regard as small items of taxation, were the important "executive" or administrative functions of the nineteenth century. "Executive" was, indeed, the correct word. For the internal functions of the State were largely ministerial. The discretion was vested in the courts, and the officers of the executive Government had no very large discretionary powers, except in regard to foreign affairs and the forces.¹

THE DEVELOPMENT OF INTERNAL REGULATION

A CAREFUL analysis of the machinery of government might have indicated, even before 1870, that other functions were being performed. There was developing a system of administrative regulation by such bodies as turnpike trustees, gas and water companies, and railway companies. The Factory Acts, too, were creating a system of public inspection of private industries. Still more important, from the point of view of modern developments, was the provision of services by public authorities. The community had accepted as long ago as the end of the sixteenth century the principle that the poor who were unable to work should be maintained at the public expense. The nineteenth-century constitutional lawyer might have found difficulty in placing the authorities exercising this function, the exotic guardians of the poor, in his constitutional system. Yet did they stand alone; for though the development of services by the town councils, under Private Acts, might have been regarded as a peculiar manifestation of the law relating to corporations, there

¹ See generally Ch. I, § 1.

were "highway boards" and "local boards of health" in existence before the middle of the century.

THE PUBLIC SERVICES

It is this last system, the system of public services, which has developed most during the past sixty years. A child may be born in a public hospital, receive after-care from a public official called a health visitor, be vaccinated by a public vaccinator, educated in a public elementary school, a public secondary school, a public evening school, or a public technical school, receive medical and dental treatment from the school medical and dental service, be fed in school, and secure employment from a publicly provided employment exchange. He may then get married before a public official, live in a "council" house, use publicly provided gas, water, electricity, and even milk, place his savings in a post office or municipal bank, receive medical treatment at the public expense, draw unemployment benefit if he loses his job, travel in municipal tramways and omnibuses, send and receive letters through the public postal services, and so on.

THE ADMINISTRATIVE MACHINE

ALL this implies a complicated administrative machinery whose members do far more than "execute" the laws. Many of them, it is true, do nothing except carry out the orders of superior officers. The superior officers lay down general principles and decide unusual individual cases. Somewhere in each branch of the service a substantial discretionary power is vested. The legislation sets up the machinery, gives the powers of compulsion, and provides the money. Frequently

there is no "command" to be "executed," but a discretionary power of providing a service at the public expense.

We might study this great administrative machine by regarding the three sorts of functions which it exercises—the police functions and general external functions of the old "executive"; the regulatory functions of the Board of Trade, the Home Office, and the Ministry of Transport; and the public services provided by the Ministry of Labour, the Ministry of Health, the Ministry of Agriculture and Fisheries, and the subordinate authorities connected with them. But we are interested rather in the machinery than in the functions, and in any case the division suggested is by no means exact. Much more useful is another three-fold division—the Central Government, the independent statutory authorities, and the local authorities.

THE CENTRAL GOVERNMENT

UNLIKE the other administrative authorities, the Central Government does not obtain its powers only from statutes. For it exercises as well the powers which are vested in the King by the common law. These prerogative powers, as they are called, are the powers which the courts recognise as remaining vested in the King under the rules of common law. The courts accepted the consequences of the revolution of 1688. They admitted that the powers of the King were subject to restriction by statute, and they regarded as valid the limitations imposed by the Bill of Rights. Thus the prerogative powers are, in the words of Dicey,¹ quoted

¹ *Law of the Constitution* (8th ed.), p. 420.

in the House of Lords,¹ "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown." They consist of the powers which the courts recognise as remaining to the King after the revolutions and subject to the statutes which Parliament has passed under the supremacy which it has successfully claimed since 1688.

Most of these powers, though legally vested in the King, are not exercised by him personally. He still exercises a discretion in the appointment of the Prime Minister; he still claims to exercise on his own account the prerogative of dissolution; he still has considerable influence over the choice of ministers and bishops; he still exercises indirectly a substantial influence upon the general policy of the country.² But the power in all cases except the appointment of the Prime Minister is in fact exercised by some minister on his behalf. Where the power can be exercised only by Order in Council, as in the summoning of Parliament, there must clearly be officers of State associated with the King in carrying out the formal legal act. And where the Great Seal or the signet has to be used, the minister in charge of it accepts responsibility. Thus the Prime Minister, with the consent of the Head of the Department, appoints leading civil servants; the ministers appoint other civil servants; the Secretary of State for Foreign Affairs conducts foreign relations, enters into treaties, and appoints ambassadors; the Dominions Secretary communicates with the Dominions; the Colonial

¹ *Att.-Gen. v. De Keyser's Royal Hotel Co.*, [1920] A.C. 508, at p. 526.

² See Jennings, *Cabinet Government*, esp. Ch. XI and XII.

Secretary appoints governors and governs the Colonies through them; the Secretary of State for India accepts final responsibility for the government of India; the First Lord of the Admiralty, the Secretary of State for War, and the Secretary of State for Air govern the royal forces; the Home Secretary pardons criminals.

These ministers are not, however, concerned only with the prerogative powers. Most of them also have statutory powers. Moreover, the ministers whom I have not mentioned above perform very few prerogative powers. Statutes may give powers to the King. Quite frequently they give powers to the King in Council. For example, when it was desired to alter the constitutions of British Guiana and Malta, powers were given to His Majesty to effect the alterations by Order in Council. But more often the powers are actually vested in the ministers. It is provided that "One of His Majesty's Principal Secretaries of State," or the Minister of Labour, or the Treasury (or the Lords of the Treasury), or the Postmaster-General, may do the things required.

CABINET CONTROL

ALL these powers, prerogative and statutory, are exercised by the ministers; but the Cabinet controls the general policy.¹ For example, though the Foreign Secretary may conduct the negotiations for a treaty and sign and ratify the treaty, the general policy embodied in the treaty is determined by the Cabinet. Similarly no substantial change in his policy in ad-

¹ See Jennings, *Cabinet Government*, Ch. IX.

ministering the Road Fund would be taken by the Minister of Transport except after obtaining the approval of the Cabinet. Whether a matter is placed before the Cabinet depends entirely upon the minister's conception of its importance. Whether the Cabinet does in fact discuss it depends upon the time available and the interest which members of the Cabinet have in it. The result is, however, to give the Cabinet a general control over the activities of the Departments. Since the Cabinet also has control over the House of Commons, the Departments can, within the narrow limits of the time available, obtain what additional statutory powers they consider desirable. Since, too, the ministers or their representatives are in the House of Commons, members of that House can ask questions and introduce debates in respect of the administrative functions of the Departments. If the minister's policy has received the approval of the Cabinet, he can rely on Cabinet support in the House and the putting on of the Whips to ensure the approval of the House. Though ministers similarly answer in the House of Lords, the votes of that body are not taken seriously; and accordingly only the discussions in the Lower House really matter. The effect is to co-ordinate the legislative and administrative functions of the State. If there is any conflict between them, either the Cabinet or the House of Commons must go. The Cabinet can appeal to the electorate by means of the prerogative power of dissolution; but if that appeal fails, the Cabinet must resign. A new Cabinet will reverse the policy, and new ministers at the heads of the Departments will carry out the new policy.

§ 2. *The Civil Service*

THE WORK OF THE CIVIL SERVICE

OUR language assumes that administrative acts are performed by ministers. But this is almost as much a fiction as the statement that the king governs the Empire. For it is clear that no minister who has to be in his place in Parliament, to make speeches in the constituencies, and to take his share of Cabinet discussions, can take part in even a substantial fraction of the work of his department. The details of administration are performed by minor administrative officers. Most decisions are taken by officers of higher rank. Even the decisions of a minister are taken after full consideration by and advice from the senior officials of his department. It is the function of the civil service to administer and of the ministers and the Cabinet to control administration. The ministers do nothing except take decisions on matters of importance.

ITS PECULIARITIES

THIS civil service is in many respects the most peculiar of the institutions of the British Constitution. It contained in 1929, altogether, some 434,000 persons. But this figure includes the industrial workers in the royal dockyards, in Woolwich Arsenal, in the Post Office Engineering Department, in the Office of Works, and in His Majesty's Stationery Office. It includes also the manipulative staffs of the Post Office and the messengers, porters, and charwomen of all the Departments. Of the total only about 229,000 come within the definition of "civil servant" in the Superannuation Acts as hav-

ing pensionable posts. And those "concerned with the formation of policy, with the co-ordination and improvement of Government machinery, and with the general administration and control of the Departments of the Public Service" ¹ number about 1,140.

ALL ARE LEGALLY SERVANTS OF THE KING

THE peculiarity of the civil service rests in its internal organisation. Every one of these 434,000 persons is in law a servant of the king. In this respect they are exactly like ministers. Indeed, it has been laid down in the courts ² that the Postmaster-General and a telephone engineer are fellow servants. Consequently the courts are not concerned with the civil service as such. They are concerned only to discover whether an officer is a servant of the Crown. Once they have achieved this by no means easy task,³ they need not consider whether he is a minister or a civil servant, or what sort of civil servant he is, for his liability for wrong is in either case the same, and the powers are those either of the king or of the named minister—for example, the Postmaster-General or the Minister of Transport.

¹ This is the official definition of the "administrative class" of the civil service. See *Royal Commission on the Civil Service* (1929), Introductory Memoranda, p. 9.

² *Bainbridge v. Postmaster-General*, [1906] 1 K.B. 178.

³ "The term 'Crown servant' has not been authoritatively defined. But there are cases in which the courts have had to consider whether or not the holder of a particular office was a Crown servant. In each case the decision was based upon the facts of the case before the court, and no comprehensive definition of 'Crown servant' appears to have been attempted." (N. E. Mustoe, *The Law and Organisation of the British Civil Service* (1932), p. 15.) Mr. Mustoe proceeds to discuss eighteen cases on the subject.

THE ORGANISATION OF THE CIVIL SERVICE IS OUTSIDE
THE CONTROL OF THE COURTS

THE courts are not concerned with the civil service as such, because there is a "law and practice of the civil service" as there is a law and practice of Parliament.¹ It is outside the jurisdiction of the courts because the civil servant is in law only a servant of the Crown, dismissible at the king's pleasure without notice, or compensation, or retiring allowance, or pension.² Yet it is a fact of common observation that a civil servant has a greater security of tenure than any person in private employment, and that he has substantial pension rights which he can enforce by the proper procedure. None of these rights is enforceable in the courts, because the whole organisation of the civil service is regarded by the courts as a matter of administrative discretion which is outside their control. Indeed, the civil service was created, and continues to exist, merely by reason of administrative decisions.

Since the seventeenth century, if not earlier, Orders in Council have been made to regulate the establishment of the Crown. The powers of government were vested in the king, and it was immaterial what methods he used to carry them out. He could appoint and dismiss what servants he pleased, and when Parliament came to control the king's expenditure it was concerned only with the number and not the individuals. In the eighteenth century the Opposition was always anxious to reduce numbers and to exclude them from

¹ See *ante*, pp. 106-7.

² *Dunn v. The Queen*, [1896] 1 Q.B. 116; *Shenton v. Smith*, [1895] A.C. 229; *Nixon v. Attorney-General*, [1931] A.C. 184.

Parliament, for the public service represented a power of patronage which was very useful to the King both in influencing elections and in keeping a majority in the House. For example, the Treasury had considerable influence in elections through its control over the officers of customs and excise, and the Admiralty was always able to return Crown nominees (or, sometimes, Admiralty nominees) for the boroughs which contained royal dockyards. Similarly, every member of Parliament who held an office under the Crown was under the influence of the King or of the Government.

FEW STATUTES APPLY

CONSEQUENTLY, while the total expenditure on the various Departments is prescribed by Parliament in the annual Appropriation Act, no statute prescribes the salary and conditions of service of individuals.¹ The only statutes affecting the civil service are in two groups. There are statutes of the eighteenth century which prevent many classes of civil servants from sitting in Parliament² in order that the number of persons in the House of Commons holding offices under royal influence might be decreased. There are, too, the Superannuation Acts, authorising the Crown to grant pensions, though not giving any rights to pension. The latter group was enacted because of the tradition that royal pensions were useful pieces of patronage for political purposes.

¹ There are a few special exceptions, and the salaries are contained in the Estimates submitted to the House of Commons.

² See the summary in Anson, *Law and Custom of the Constitution*, Vol. I (5th ed.), pp. 101-4.

OTHERWISE IT IS REGULATED BY ADMINISTRATIVE ORDER

APART from these statutes, the civil service is regulated purely by administrative orders. The great reorganisation of the public services which really created the modern civil service was effected in 1855 solely by Order in Council, and many such Orders have since been issued. Thus Orders in Council set up a Civil Service Commission to regulate admission to the civil service, and all such matters as the grading of the service, pay, promotion, leave and sick leave, hours of attendance, and age of retirement, were formerly prescribed by Orders in Council. But the consolidating Order of 1910 conferred upon the Civil Service Commissioners and the Treasury power to make regulations for these matters, and this has been continued by the Orders of 1920. Consequently appointments to the service are governed by regulations of the Civil Service Commissioners, and the classification and conditions of service are dealt with either by the Orders or by Treasury Regulations. But many matters of general importance are dealt with even less formally by Treasury circulars addressed to the Permanent (i.e. Civil Service) Heads of the Departments.

The result is that the working of the civil service is provided for almost entirely by administrative action. The methods of organisation and functioning of each Department are (subject to Treasury sanction, since the Treasury has to find the money¹) regulated by the minister. Discipline, too, is maintained by the chief civil servant in the Department, under the control of

¹ On Treasury control, see Jennings, *Cabinet Government*, Ch. VII.

the minister. But though ministers come like water and go like the wind, these rules are really fairly constant; so that each Department has its internal rules, interpreted by the minister, and as permanent as many parts of the law. Over the whole service there are Orders, regulations, and Treasury minutes which determine the appointment and conditions of service of all civil servants.¹ These rules, too, are exactly like the rules of law, except that they are not subject to interpretation or application in the courts. They form the internal law of the civil service.

THE INTERNAL LAW OF THE CIVIL SERVICE

THAT internal law, too, gives rights to the civil servant. "It is a well-established rule that every civil servant has the right to appeal against dismissal or other disciplinary penalty to the Head of his Department." "Except in cases which may give rise to criminal proceedings, full particulars of any charge against an officer's conduct shall be communicated to him in writing before any disciplinary action is decided upon. . . . It is for the Head of the Department to decide whether any further inquiry into the facts is necessary before a decision is taken, and to determine what form that inquiry shall take."² These are the principles laid down by the Treasury. They imply that the civil servant has a right to hold his post until he reaches the retiring age, or until he is proved to have committed some act which is contrary to the interests of the ser-

¹ For all this, see *Royal Commission on the Civil Service* (1929), Introductory Memoranda, pp. 22-8.

² *Ibid.*, pp. 29, 30.

vice. In a small Department, the right of appeal means nothing, or the Head of the Department will probably have taken the decision for dismissal. In other cases it is an appeal to an impartial authority. In any event, there is always a political appeal to Parliament, to which the minister is technically responsible.

WHITLEY COUNCILS AND THE INDUSTRIAL COURT

CONDITIONS of service are regulated by the Treasury, but a system of consultation is provided for the conditions attaching to the lower-grade posts by means of Whitley Councils. Representatives of the organisations of civil servants discuss matters on these Councils with the "Staff Side"—that is, senior civil servants acting on behalf of the Treasury. A decision of a Whitley Council "takes effect" by reason of a permanent Cabinet minute, and the Treasury proceeds to put it into effect. The "Official Side" are acting in an official capacity, and ministers therefore accept responsibility for their decisions. Thus the Whitley Councils provide not only a negotiating machinery, but also a machinery by which rights for the various grades of civil servants may be established. But compulsory arbitration is provided for for some grades by means of the Industrial Court, to which any civil service association has access. Though the Treasury and the Departments have power to rule whether matters are or are not within the terms of the agreement, the procedure of arbitration enables any class of civil servant to secure an impartial decision on their claims. The ultimate responsibility necessarily rests on the Treasury,

which is responsible to Parliament for the national finances. Nevertheless, the Treasury has so far faithfully carried out the awards, and within four years claims had been submitted to the court in respect of 250,000 civil servants.

If we remember that claims for pensions are dealt with by the Treasury under the Superannuation Acts, we reach the conclusion that all matters relating to the conditions of service of civil servants are covered by general rules which are treated as such by the proper authorities. Negotiation and even arbitration are provided for settling disputes. Thus the "law and custom" of the civil service, though not applied by an impartial outside body like the courts, provides just as definite and concrete rules as the ordinary law. The real peculiarity of the British civil service is that this system is nowhere provided for in the ordinary law, and that it arises simply because a civil servant, like a minister, is in law just a servant of the Crown, dismissible at any moment.

MINISTERIAL RESPONSIBILITY

THIS system rarely leads to difficulties because of the overriding constitutional convention which regulates the whole service. Each minister is responsible to Parliament for the conduct of his Department. The act of every civil servant is by convention regarded as the act of his minister. The general control of the civil service is vested in the Treasury, and the Prime Minister (as First Lord of the Treasury) and the Chancellor of the Exchequer accept responsibility. It is a recognised rule of Parliamentary practice that criticism

of administrative action must be framed as criticism of a minister, not as criticism of the civil servant. The opposite rule, as we shall see in the next chapter, is applied by courts of law.

§ 3. *Local Authorities*

THE SEPARATION OF LOCAL ADMINISTRATION

THOUGH the nineteenth century was remarkable for the development of the functions of the Central Government and the creation of the civil service, it was perhaps even more remarkable for the development of local administrative authorities. There have always been local authorities in England. Indeed, it is not too much to say that in the Anglo-Saxon kingdom of the eleventh century the only effective government was the system of local government. But administrative functions and judicial functions were no more distinguished than they were in the King's Court or Council, and they remained confused long after the courts of law had separated from the Council. For from the fourteenth century until the beginning of the nineteenth century local government was in the control of the justices of the peace, who exercised their "administrative" functions—government of the gaols, the control of the constables, the control of roads and bridges, the control of poor relief, the exercise of licensing powers, and the fixing of prices—according to judicial forms. A series of great enactments in the nineteenth century enlarged existing administrative authorities and created new authorities, so that in the twentieth century it is possible to say that very few "administrative" functions

rest with the justices, and that administrative functions are exercised by bodies which may be called "local authorities."

CHARACTERISTICS OF LOCAL AUTHORITIES

THE characteristic of a local authority is that it derives part at least of its revenue from special local taxes called "rates."¹ Rates are levied rateably upon the occupiers of land in accordance with a valuation made by "assessment committees," which are themselves local authorities within the definition.² It will be found that every authority which meets its expenditure in whole or in part out of such rates contains some members who have been elected by the local government electors³ or who have been selected by persons so elected. The converse is not true; for local authorities frequently elect persons to serve on authorities which do not meet any part of their expenditure out of rates.⁴ Also local authorities act for local areas only, though again the converse is not true. For many authorities, such as pensions committees, road traffic commissioners, General Commissioners for income tax purposes, and incorporated dock authorities, act for local areas without deriving any revenue from the rates. Thus true

¹ Jennings, *Principles of Local Government Law*, pp. 19-26.

² For the statutory definition, see Rating and Valuation Act, 1925, s. 68. For the methods of valuation and levying of rates, see Rating and Valuation Acts, 1925 to 1937. The term is, however, usually limited to the "general" authorities, i.e. councils of counties, boroughs, urban and rural districts, and parishes. See Local Government Act, 1933, s. 305.

³ Representation of the People (Equal Franchise) Act, 1928, s. 2. *Principles of Local Government Law*, p. 110.

⁴ E.g. road traffic commissioners.

local authorities are "local" in a threefold sense, though the only effective distinction is the right to draw revenue from the rates.

GENERAL AND SPECIAL LOCAL AUTHORITIES

MANY local authorities are established for special purposes. Assessment committees assess property for the levying of rates; catchment boards control the drainage of a main river; drainage boards provide for the drainage of the areas of tributaries and minor rivers¹; standing joint committees control the county police forces; special joint committees maintain hospitals, relieve vagrants, make town and county planning schemes, and exercise many other functions. But local government rests upon what may be called the general authorities, who exercise a multiplicity of functions. These are the councils of counties, boroughs, urban and rural districts, and parishes.² They have numerous statutory powers, from the major functions of public health to the inspection of weights and measures.

LOCAL DISCRETION LIMITED BY: (1) THE LIMITS OF LEGAL POWERS

WITHIN the limits of its powers, each local authority acts in accordance with its own views of what is desirable. Consequently there is a local policy in regard

¹ Drainage boards secure an income by levying a special "drainage rate." This is because occupiers of agricultural land do not, as such, pay rates, while drainage is in the main for the benefit of agriculture. But this is clearly an exceptional case, and I regard a drainage board as a local authority even though it is not within the definition. Cf. *Principles of Local Government Law*, p. 25.

² See Local Government Act, 1933, s. 305.

to public health, education, roads, poor law, agriculture, and every other local service. But this local discretion is limited in two ways. In the first place, a local authority is not given general powers to develop a service as it pleases. It has specified and limited powers given by statutes, powers which are, generally speaking, the same as those possessed by other local authorities of the same class. If it requires further powers, it must try to persuade Parliament to pass a special local Act for its benefit. This is a long, complicated, and expensive process. It takes something approaching twelve months, it involves the expenditure of a considerable sum of money by the authority, especially if any organised interest or local authority is prepared to oppose; and in the end there is no certainty that the Bill will be passed in the form desired, or at all.¹

(2) CENTRAL CONTROL

THE second limitation upon local discretion consists in the exercise by Government Departments of statutory powers of control vested in them.² There is now hardly any subject which is left entirely to local discretion. The Home Office, the Ministry of Health, the Ministry of Transport, the Board of Education, and the Ministry of Agriculture and Fisheries have large powers of control over the local activity cognate to their own functions. Indeed, nearly all the functions of the Ministry of Health, the Ministry of Transport, and the Board of Education consist in the regulation of the

¹ For the process of legislation by local Bill, see *Principles of Local Government Law*, pp. 212-25.

² *Principles of Local Government Law*, Ch. V.

activities of local authorities.¹ The extent of the control depends entirely upon statutes. In respect of the poor law and education it is almost complete so far as general policy is concerned, though this does not mean that in either branch the Central Authority can intervene in the treatment by a local authority of any individual person, unless a right of appeal is given, as it is in many cases to the Board of Education. Consequently local administration is in many respects a partnership between the Central Government and the local authorities, the general policy being determined for the most part by the appropriate Government Department and its application to the individual case being left to the local authority.

RESPONSIBILITY TO ELECTORS

WITHIN the limits of statutory powers and control, the local authority is free to do as it pleases. But those of its members who are elected councillors are responsible to their local electorates, and can be rejected by them at the next election. There is thus a threefold check. But responsibility to electors is not necessarily so obvious or so direct as it is in the House of Commons. There are members of borough and county councils called aldermen, who are not elected by the electorate, but by members of their councils. There are members of committees who are not elected members of the councils, but are co-opted by them because they have

¹ This is subject to the qualification that the Ministry of Health administers a direct service, the National Health Insurance system, and that the Ministry of Transport is concerned also with railways, canals, trainways, and electricity supply.

special experience. There are members of agricultural committees who are appointed by the Minister of Agriculture and Fisheries. All members of joint committees are necessarily not directly elected: they are usually elected members of councils nominated by the councils to serve on the joint committees.

The reason is—though it may not be satisfactory to the pure democrat—that local government is not concerned only with major questions of policy. Its function is rather that of honest and experienced administration. Provided that there is security for the determination of matters of policy according to the wishes of the electorate, so far as they can be ascertained, the major requisite is that the members of local authorities shall be competent administrators. For in local government the members of authorities take many administrative decisions which in the sphere of national government would be taken by paid administrators.

§ 4. *Independent Statutory Authorities*

CHARACTERISTICS

THE characteristic of a Central Department is its control by a minister who is responsible to the Cabinet and to Parliament. The characteristic of a local authority is its use of funds derived from the local rates, and therefore a responsibility, direct or indirect, to a local electorate. There are besides statutory authorities which are neither. They may act for the whole country, or they may act only for a part of it. Some of their members may also be members of Parliament or of local authorities, but since no minister is responsible

for their actions and no revenue is drawn from the rates, the authorities are neither part of the Central Government nor local authorities.

Independence of ministerial control is necessarily a matter of degree. It is therefore no easy matter to distinguish precisely between a statutory body subordinate to a minister and an independent statutory authority. Indeed, in many respects local authorities are controlled by ministers, who are responsible to Parliament for the way in which they exercise their powers of control. All the administrative authorities are closely knit together to form a single administration. It is for convenience only that we separate them.

DEGREES OF DEPENDENCE

THERE are thus degrees of dependence. For example, there are four authorities concerned with the income tax. The assessment of the taxpayer is controlled by his General Commissioners for the purposes of the income tax. These are local, independent, and unpaid commissioners who are in effect appointed by the Land Tax Commissioners—the justices of the peace and certain other persons named by statute. Consequently no minister or other person is responsible for them to Parliament. They receive this independent position because their functions involve no discretion but in the main require the ascertainment of income and the application of the law.

Any person may insist that his assessment shall be determined not by the General Commissioners, but by the Special Commissioners for the purposes of the income tax. These are persons appointed by the

Treasury, though they exercise their functions in respect of ordinary assessments in the same way as the General Commissioners.

In either case the taxpayer comes under the jurisdiction of the Commissioners of Inland Revenue, either directly or through the inspectors and collectors of taxes whom they control.¹ These Commissioners are civil servants, appointed and controlled by the Treasury.

Thus the four bodies responsible for the administration of the income tax are the Treasury (theoretically, the Lords Commissioners of the Treasury), the Commissioners of Inland Revenue, and the Special and General Commissioners. The Treasury has at its head (for Parliamentary, not for legal purposes) the Chancellor of the Exchequer, who is responsible to Parliament. The Commissioners of Inland Revenue are a separate administrative body, though they are subject to the directions and control of the Treasury, and the Chancellor is therefore responsible for their general policy. The Special Commissioners are appointed by the Treasury, though they exercise an independent function, and so are not subject to Treasury control. The General Commissioners are entirely independent.

OTHER EXAMPLES

A SCORE of examples could be cited. The British Broadcasting Corporation was established by charter under statutory authority in order that broadcasting might be freed from political influences. Though the

¹ The inspectors of taxes are theoretically appointed by the Treasury, but they receive their instructions from the Commissioners of Inland Revenue

Postmaster-General has certain limited powers of control, he is not responsible for the Corporation's policy. It is not possible, therefore, to ask questions in Parliament about broadcasting programmes, for there is no minister to ask. The Bank of England is an ordinary corporation, but with special monopoly powers given by statute, and special functions in regard to the national revenue. The Chancellor of the Exchequer is not responsible for its actions. The Central Electricity Board supplies electricity in bulk to statutory undertakers; though it is appointed by the Minister of Transport, he is not responsible for its action. The marketing boards control the production and marketing of various commodities; the Sugar Commission exercises the same functions directly and through the British Sugar Corporation; the Spindles Board purchases and destroys surplus machinery; the Sea Fish Commission, the Herring Fisheries Board, and the Shipping Commission are other bodies of this kind. The Port of London Authority controls the London docks; the Mersey Docks and Harbour Commissioners perform the same function for the Mersey. Indeed, it is possible to say that any public utility company is an independent statutory authority, for though its creation is primarily a matter of private enterprise, it has special monopoly powers by statute. Every year sees new statutory bodies of this kind created. They form the most notable feature of recent constitutional development.¹

¹ See Jennings, *Cabinet Government*, Ch. IV and Appendix III; Robson, *Public Enterprise*; O'Brien, *British Experiments in Public Ownership and Control*.

CHAPTER VI

ADMINISTRATIVE LAW

§ 1. *The Nature of Administrative Law*

DEFINITION

ADMINISTRATIVE law is the law relating to the Administration.¹ It determines the organisation, powers, and duties of administrative authorities. Where the political organisation of the country is highly developed, as it is in England, Administrative Law is a large and important branch of the law. It includes the law relating to the civil service, local government law, the law relating to public utility companies, and the legal powers which these authorities exercise. Or, looking at the subject from the functional instead of the institutional point of view, we may say that it includes the law relating to public health, the law of highways, the law of social insurance, the law of education, and the law relating to the provision of gas, water, and electricity. These are examples only, for a list of the powers of the administrative authorities would occupy a long catalogue.

DIFFERS FROM PRIVATE LAW

ADMINISTRATIVE law differs from private law in its essence. For, as is explained in Ch. I, the services

¹ See my *Principles of Local Government Law*, pp. 30-5, especially the definitions on p. 31.

provided by the State may be divided into two categories, according as they are administered by the administrative authorities or by the judicial authorities. The punishment of criminals, the settlement of disputes between individuals, the granting of divorces, judicial separations, decrees of nullity, and maintenance orders, the administration of the property of deceased persons and of lunatics, the administration of settled property and trusts, the recognition of titles to land, the dissolution of and the extension of the powers of companies, and adjudications in bankruptcy, are services administered by the courts. All the other services are provided by the administrative authorities. Thus the courts deal with every case in which private law has to be applied, unless (as in the ordinary civil law) the individual can apply it to himself without Governmental agency at all.

On the other hand, they do not deal with every case to which administrative law applies. To begin with, the administrative organisation is, within the limits of the statutes, a matter for an administrative authority. It is explained in the previous chapter that the organisation of the civil service is entirely outside the jurisdiction of the courts. The organisation of other authorities is determined by statutes with greater precision. Statutes commonly prescribe the number and powers of members of independent statutory authorities. They are, however, less specific in regard to local authorities. Though the method of selecting members of local councils is prescribed by law, the number of members, the areas of election, the area of administration, and the methods of administration are

left to be determined by the Home Office, the Ministry of Health, the county councils, or the local authority itself. Similarly the application of the poor law to an individual poor person, of the Education Acts to an individual child, the Public Health Acts to an individual plot of land, and so on, is primarily a matter for the local authority, though sometimes with an appeal to a court. The application of social insurance law, too, is primarily a matter for the individual instrument of the Ministry of Labour or of the Ministry of Health.

FUNCTIONS OF THE COURTS UNDER ADMINISTRATIVE LAW: (1) APPEALS

NEVERTHELESS, administrative law is not entirely withdrawn from the cognisance of the courts. For they have three functions to fulfil. In the first place, they frequently hear appeals from the decisions of administrative authorities. Examples are numerous: thus, the High Court hears appeals on points of law from the General and Special Commissioners in income tax matters; courts of quarter sessions hear appeals from assessment committees in respect of valuations for rating purposes; county courts hear appeals against demolition orders under the Housing Acts; justices in petty sessions hear appeals against the apportionment of charges for making up streets and many other matters under the Public Health Acts.

(2) ULTRA VIRES

IN the second place, the courts prevent administrative authorities from exceeding their powers and compel them to carry out their statutory duties. They have

certain complicated and expensive remedies called prerogative writs for this purpose,¹ and any person injured can request a court to issue one. Thus a writ of mandamus can be issued to a public authority to compel it to carry out any duty imposed upon it by statute. A writ of prohibition can be issued to restrain a public authority from proceeding with an administrative adjudication on the ground that it has no statutory or common law power to do it. A writ of certiorari can be issued to reverse a decision of a public authority on the ground that it has no legal power to take the decision. A writ of quo warranto can be issued to a public authority in order to contest an assumption of office which is not justifiable by law. In short, by means of these writs the courts perform the valuable and essential function of interpreting the limits of the powers of the administrative authorities and issuing orders to prevent any authority from exceeding its powers.

(3) REMEDIES FOR WRONGS

IN the third place, the courts provide remedies for any person who suffers injury as a result of a wrongful act on the part of an administrative authority or its officers. The English law on this subject is, however, very defective owing to the immunities recognised by the law to be possessed by a legal entity called "the Crown."

THE CROWN

By "the Crown" we mean normally the King exercising his legal powers through one of his servants.

¹ See *Principles of Local Government Law*, Ch. VII.

It is not, however, a technical term of precise signification. It is used sometimes simply as a synonym for the King. We can say, for instance, that the Prime Minister is appointed by the Crown. It would not be entirely inaccurate to say that the Crown sometimes opens Parliament in person. Nevertheless, the tendency is to use the word "King" in regard to acts which the King does personally and the word "Crown" in relation to acts which are done by some public authority, but ascribed to the King because the power so to act is legally vested in the King. For example, all civil servants and all officers of the royal forces are said to be appointed by the Crown. Though even here a qualification must be introduced. For some civil servants are in fact appointed by the ministers of the appropriate Departments and some senior civil servants are appointed by the Prime Minister. The latter are said to hold "Crown" appointments. But this is really a matter of civil service terminology, and would not be recognised by the courts. The language used by the courts would imply that all civil servants are appointed by the Crown and so are servants of the Crown. Similarly we speak of Crown property, of treaties being made by the Crown, of legislation by the Crown in Council, of Crown revenues, and of the liability of the Crown.

ACTS OF THE CROWN

IN legal language, therefore, many of the acts done by the Central Administration are the acts of the Crown. Whenever a minister or a civil servant performs any function he is acting as a servant of the Crown. But

since the Crown possesses special immunities, the acts of the Central Administration are, as such, cloaked with special privileges in regard to legal proceedings. For the common law has a maxim that "the King can do no wrong." No proceedings can be brought against the King, for the courts are his courts, they act in his name, and their powers were originally derived from the King's own authority, though they have long since successfully asserted their independence, and in the main their functions are now provided for by legislation.

WRONGS COMMITTED IN THE PUBLIC SERVICE

BUT since the King can do no wrong, he can authorise no wrong. Therefore any servant of the Crown who commits a wrong must commit it without authority. He thus renders himself personally liable, even though he was acting as a servant of the King and on behalf of the King. Indeed, it was decided by the House of Lords, on the impeachment of the Earl of Danby, that an authorisation in the King's own hand was not a protection to the servant.¹ Moreover, it is recognised constitutional practice, if not law, that the King never does any administrative act alone, but always acts either through a servant or with the concurrence of a servant. Thus whenever a wrong is committed in the course of administration the person injured has a remedy against the servant who committed it, or who concurred with the King in committing it (though it is more correct to say, in law, that the servant committed

¹ *Earl Danby's Case* (1679), 11 St. Tr. 599.

it, for since the King can do no wrong, it is legally quite impossible for him to concur).

REMEDIES AGAINST CROWN SERVANTS

BUT the remedy is against the servant personally, not in his capacity as administrative officer. The injured person cannot sue the Postmaster-General or the Minister of Health. He must sue the gentlemen who for the time being hold the offices. He cannot sue, that is to say, so as to make public funds liable.¹ Moreover, he must sue the servant who actually committed the wrongful act or the person who authorised it. If he is falsely imprisoned by a metropolitan policeman, he can sue the policeman, but not the Commissioner of Police for the Metropolis or the Home Secretary, unless these persons ordered the arrest. If his aeroplane is seized on behalf of the Air Ministry, he can sue the officer who seized it and the officer who ordered the seizure; he cannot sue the Secretary of State for Air or the Air Council unless he can prove that they ordered it, and then he must sue them in their private capacity.²

Further, where an officer or an authority has a discretion, the person injured has no remedy as a result of the exercise of that discretion, even if it was exercised wrongly and maliciously and without reasonable cause.³ There are, too, other limitations; for instance, an act done by a British officer on the authority of the Crown, in foreign territory and against a foreigner, is

¹ *Mackenzie—Kennedy v. The Air Council*, [1927] 2 K.B. 517.

² *Ibid.*

³ *Fraser v. Hamilton* (1917), 33 T.L.R. 431.

an "act of State" and gives no right of action, even if it would be grossly wrong if done elsewhere.¹

NO REMEDY AGAINST THE DEPARTMENT

THE right of action, then, is not always available. If it is available, it cannot be brought against the Crown, or the Department, or in any way whatever so as to make the Treasury liable. There are only two exceptions to this. By section 26 of the Ministry of Transport Act, 1919, the Minister of Transport may be sued in respect of matters of contract and tort and otherwise in that name, and is responsible for the acts and defaults of the officers and servants and agents of the Ministry to the same extent and in the same manner as if they were his servants.² And by section 460 of the Merchant Shipping Act, 1894, the Board of Trade may be sued for the unlawful detainer of a ship. Except in these cases the only action available is against the person who actually commits the wrong.³ He may be a police constable, a private soldier—for the same principles apply to members of the royal forces as to other servants of the Crown—the driver of a post office van, a telephone engineer, or a workman belonging to the Office of Works. The State puts the servant in the position of being able to commit substantial damages and

¹ *Buron v. Denman* (1848), 2 Ex. 167; *Walker v. Baird*, [1892] A.C. 491; *Johnstone v. Pedlar*, [1921] 2 A.C. 262.

² This is a very important exception now that the "trunk roads" are vested in the Minister under the Trunk Roads Act, 1936.

³ This is subject to the qualification that *criminal* liability for offences under the Road Traffic Acts, 1930 to 1934, is imposed upon a person selected by the Department concerned. See s. 121 of the Act of 1930, and my note, *Law Quarterly Review*, Jan. 1931, pp. 12-14.

assumes that a remedy against a workman earning £3 a week is a good remedy.

SPECIAL RULES

NOR is this all; even when a remedy is available there are special rules as to costs and a specially shortened period within which the proceedings must be brought. For section 1 of the Public Authorities Protection Act, 1893, applies where proceedings are taken against any person for "any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any such act, duty, or authority." Then the proceeding must be brought, if at all, within six months after the act, neglect, or default complained of, or in case of a continuance of injury or damage, within six months after the ceasing of the injury; and if judgment is given for the defendant, he secures costs "as between solicitor and client"—that is, on a higher scale than in ordinary actions.

BREACHES OF CONTRACT

STILL this is not all. For the rule of the liability of the officer applies only to cases of civil injury, or "tort." It does not apply to breaches of contract. There no action can be brought against the servant, for the contract is made with the King, and the servant is no party to it.¹ Nor can it be brought against the Department. Nor can it be brought against the Crown.

¹ *Macbeath v. Haldimand* (1786), 1 T.R. 172 (unless, of course, he personally accepts a liability under the contract, as by saying, "If the Government does not pay, I will").

The other party to the contract must petition the Crown by what is called a "petition of right," to allow the courts to investigate the matter. If the Home Secretary thinks fit, the King will give his *fiat*, and the proceedings can then continue as if they were an action against the Crown. In practice the *fiat* is not refused. But there is delay and expense involved in securing it, and it is always possible that the Home Secretary will refuse. This "remedy," it should be added, is available only where a contract with the Crown is broken by the Crown or where property belonging to the plaintiff remains without legal authority in the possession of the Crown. It is not available in cases of tort.¹

THE LIABILITY OF OTHER ADMINISTRATIVE AUTHORITIES

THESE difficulties and weaknesses in the remedies available to a private person against the administration flow from the special position of the Crown. They apply, therefore, only to those administrative authorities which stand within its shadow and not to the statutory authorities and local authorities which are not "servants of the Crown." These are liable in contract and in tort in the same way as private individuals. But this must be taken subject to four qualifications. The first is that they have large powers derived from administrative law which bear no relation to the ordinary rights and duties of ordinary men. The authority can not only provide services for ordinary men; it can also interfere with the ordinary rights of ordinary men. A local authority raises money by taxation, takes land compulsorily, establishes sewage

¹ *Tobin v. The Queen*, 14 C.B.N.S. 505.

farms, refuse disposal dumps, and other works which might be regarded as nuisances if set up by private persons; it has powers of inspection and control and may have the power to destroy property. Its rights and duties are very different. It commits a tort only when it exercises one of these functions wrongly, or interferes with person or property without lawful justification. It is then liable (with a few minor exceptions) in the same way as a private person.¹

The second qualification is that a statutory authority² has only the powers which are expressly assigned to it by statute. It has not the powers of an ordinary citizen except so far as they are contained in the statutes. This means, in practice, two things. It means, first, that a contract is not enforceable against the authority unless the authority had power to enter into it. If it had no power to do a certain kind of act, it had no power to enter into a contract to do it. There is no contract, so far as enforcement against it is concerned.³ It means, secondly, that the acts of a servant sometimes may not be imputed to the authority if the authority had no power to do the acts. For then the servant has

¹ *Mersey Docks and Harbour Board v. Gibbs* (1866), L.R. 1 H.L. 93. Note that this does not necessarily include a case where a local authority fails to carry out a statutory *duty*, negligently or otherwise. It is then a question of interpreting the statute imposing the duty. For instance, a local authority is not liable for injury resulting from failure to repair a road or provide adequate sewers; but if it repairs negligently, or provides defective sewers, it is liable.

² And also a borough, which is a common law authority, not a statutory authority. But a borough has no power to do any act which involves a charge upon the borough fund. See *Principles of Local Government Law*, pp. 206-9.

³ *Ashbury Railway Carriage Co. v. Riche*, (1874) L.R. 7 H.L. 653.

received no valid power to do the acts; they were not done in the course of his employment; and the authority will not be liable. This qualification is not, however, limited to administrative law, for these rules apply equally to an ordinary industrial company.

The third qualification is that a person who appears to be the servant of the authority may not be so in fact. If he is not, he will not render the authority liable, and proceedings can be taken against him personally only. This is peculiar to administrative law, for it arises because the officer may himself have statutory duties. For example, a poor-law officer is so much under the control of the Minister of Health that he is not regarded as the servant of the local authority which pays him.¹ Similarly a police officer effecting an arrest is exercising an independent power, and is not a servant of the borough council which appoints him and pays his salary.²

The fourth and last qualification is that any act of a statutory authority is in execution or intended execution of a statutory power or duty. It therefore comes within the Public Authorities Protection Act, 1893, and the authority has privileges in respect of the time available for action and in respect of costs.

ADMINISTRATIVE LAW AND PRIVATE LAW

THESE rules indicate that even that part of administrative law which comes before the courts is very different from the corresponding parts of private law. There is, nevertheless, a common element. An administrative

¹ *Tozeland v. West Ham Guardians*, [1907] 1 K.B. 920.

² *Fisher v. Oldham Corporation*, [1930] 2 K.B. 364.

officer who commits a crime in the course of his employment is just as liable in the ordinary criminal courts as a private citizen. An administrative officer who commits a tort in the course of his employment is liable in the ordinary civil courts, though he may have the minor protections of the Public Authorities Protection Act, 1893. In both cases the position of a soldier, sailor, or airman in the royal forces is the same. It must, of course, be remembered that this is of small importance to the person injured. For he wants to sue not the officer but the employer; but he cannot sue the Crown, and may not be able to sue a statutory authority. Moreover, what would be a tort in a private citizen is not necessarily a tort in a public officer, because of the special powers of the officer or of the authority on whose behalf he is acting. Nevertheless, the application of the ordinary law, when it applies, is an interesting characteristic of English administrative law.

POWERS IN RESPECT OF PERSONAL LIBERTY

THE characteristic is especially noticeable in the realm of personal liberty. For here most of the special powers are possessed not by the administration but by judicial officers. They are part of the machinery available for enforcing private law and criminal law. It is true that constables, who are appointed by administrative authorities, possess larger powers of arrest than ordinary individuals. But these are not exercised under the control of any administrative authority. The constable has independent statutory powers.¹

¹ *Fisher v. Oldham Corporation (sup.)*.

Moreover, where these powers are not available it is necessary to secure a warrant from a justice of the peace, or from one of those persons, such as Secretaries of State and High Court judges, with the same powers.

Thus, if the Home Secretary wishes to have a man arrested, he can order a police officer to arrest, or he can ask a justice for a warrant, or he can give a warrant himself. But if the police officer has no power of arrest, or the warrant is invalid, the Home Secretary has committed a tort by being a party to an unlawful arrest. He can be sued in the ordinary courts, and the ordinary rules of private law will be applied.¹ The same result will follow if the warrant was an illegal warrant to search for papers.² Moreover, a person wrongly arrested can secure a writ of habeas corpus calling upon the gaoler to produce him before the High Court, whether the gaoler is a private citizen, the Governor of one of His Majesty's prisons, or a Secretary of State.

§ 2. *Administrative Law in England and Elsewhere*

CONFUSION OF PUBLIC AND PRIVATE RESPONSIBILITY

THIS mixing up of public and private responsibility is one of the peculiarities of English law. Many constitutional systems make a clear distinction between them. It is obvious that large special powers must be vested in the hands of the administrative authorities, on account of the special functions which they have to perform. It is equally obvious that the nature and

¹ *Leach v. Money*, (1765) 19 St. Tr. 1002.

² *Wilkes v. Wood*, (1763) 19 St. Tr. 1153; *Entick v. Carrington*, (1765) 19 St. Tr. 1030.

extent of these powers puts them in a position to injure a private citizen far more seriously than a private citizen can do. The individual therefore needs larger rights and different remedies against the administration than against his fellow citizens. Most legal systems recognise this, and provide accordingly. The modern development of the prerogative writs enables us to say that some special remedies exist in England.¹ But they do not provide the necessary remedies to the individual where he is injured. They operate only to compel the doing of acts or to restrain the commission of unlawful acts. They do not compensate him for his injuries. The higher administrative authorities are under no liability for tort, and the citizen's only remedy is a right of action against an individual, who is probably unknown to him, and who may have no funds from which to pay damages.

ADMINISTRATIVE COURTS

SOME systems of law, indeed, go even further. They assert that the State owes a special duty to protect the individual against abuse by the administrative authorities of the special powers confided to them. They have therefore established special administrative courts to investigate complaints against administrative authorities. This is the position in France, for instance. There, for historical reasons, complaints against the administration as such are excluded from the ordinary courts and must be brought before the administrative courts, which are under the control of the Conseil d'État. That court has developed a body of *juris-*

¹ See *Principles of Local Government Law*, Ch. VII, and *ante*, pp. 196-7.

prudence, or case law, which gives effective remedies for any person injured. In particular it has developed the *recours pour excès de pouvoir* which enables the Conseil d'État to annul an act of the administration on the ground that it is *ultra vires*. Also, when the administration wrongly exercises the powers which it possesses, there is a remedy on account of *détournement de pouvoir*. These remedies clearly have their parallel in the prerogative writs, though they have been developed more completely and more logically. There is, moreover, a parallel with our law of remedies against public authorities. The jurisdiction is divided, however, between the civil courts and the administrative courts. If the wrong committed by the administrative officer is not committed in the course of his public employment, an ordinary civil action may be brought against him to the civil courts, and the measure of his liability is determined by the ordinary civil law. If, on the other hand, the act or neglect may be imputed to his employment, the administrative court alone is competent, the remedy is against the administration and not the officer, and the principles of liability are rather more stringent against the administration.¹ Usually a course of action involves both a *faute personnelle* and a *faute de service*, and proceedings can be taken in both courts, though by the application of the principle of subrogation the injured person secures damages only once.

¹ They vary, however, "according to the needs of the service and the necessity of conciliating the rights of the State with private rights": *Blanco* case (Trib. des Confl., 1st Feb., 1873). But need and necessity are determined by independent judges, and there is a remedy, while there is none in England. An English lawyer cannot judge of the *adequacy* of the remedy.

“DROIT ADMINISTRATIF” ACCORDING TO DICEY

THIS lack of separation between civil law and administrative law in England seemed so important to Dicey that he erected it into a principle. The second of the three doctrines that make up “the Rule of Law”¹ was, he said,² that “every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.” With this principle he contrasted the principle applied in France. In France, he said,³ “officials are, or have been, in their official capacity to some extent exempted from the ordinary law of the land, protected from the jurisdiction of the ordinary tribunals, and subject in certain respects only to official law administered by official bodies.” This difference he elaborated in a whole chapter,⁴ and he drew conclusions very favourable to the English system from the contrast.⁵

In Dicey’s statement of the principle it is important to notice the little qualification “*or have been,*” which did not appear in the earlier editions of his book. For his statement is true of the French system established under the Napoleonic Constitution of the year VIII of the Republic and continued for a substantial part of the nineteenth century. The statesmen of the Revolution had witnessed evil consequences from the control of the judicial authority over the administration and

¹ *Ante*, pp. 41–61; and see Appendix II.

² *Law of the Constitution* (8th ed.), p. 189.

³ *Ibid.*, p. 190.

⁴ *Ibid.*, Ch. XII.

⁵ See especially *ibid.*, pp. 389–99.

were careful to provide that administrative authorities should be controlled only by higher administrative authorities in accordance with the principle of the separation of powers as understood in France. But it soon became necessary to allow the layman a method for bringing his complaints to the attention of the superior administrative body, the Conseil d'État. Like any other administrative body, the Conseil d'État created precedents and tended to follow them. After 1818 the task of dealing with these complaints was in practice assigned, as Dicey points out,¹ to a special committee or *section*, which tended to behave exactly like a court. It followed definite principles based on its own precedents, heard legal argument by counsel, and rendered decisions publicly, which were reported. After the Revolution of 1848 it was definitely a court, deciding according to principles of law which became the subject of discussion and commentary by lawyers.² This was made abundantly clear by the law of May 24th, 1872, which set up a special court, the Tribunal des Conflits, whose function was and is to determine whether a case brought before a civil court ought not to be determined in an administrative court, and to decide whether either kind of court has jurisdiction in a case which both refuse to take on the ground of lack of jurisdiction. This Conflict Court consists of eight *conseillers* or judges, with the Minister of Justice (as *Garde des Sceaux*) as titular president. Three of the judges are elected by the judges of the Conseil d'État, and three by the Cour de Cassation (the highest civil

¹ *Op. cit.*, p. 363.

² Cf. van Poelje, *De administratieve Rechtspraak in Engeland*, Ch. II.

court, though it is not a court of appeal in the English sense), and these six elect two others. The fact that the Minister of Justice is titular president does not in the least, as Dicey suggests,¹ make the court an instrument of the Government. The Lord Chancellor in England is not merely titular president but actual president of the House of Lords (in its appellate capacity) and of the Judicial Committee of the Privy Council. It is true that he is a lawyer, whereas the Minister of Justice need not be; but a Minister of Justice who is not a lawyer cannot do anything in the Conflict Court for the simple reason that he does not know what the question, which is one of strict law, is about. In practice he does not sit at all, except for formal occasions.

The Conseil d'État, then, is a court staffed by professional judges, as independent of the Government as the judges of the civil courts,² determining legal questions according to rules of law, and in the process building up a system of precedents just as English judges built up the common law. Though originally set up to protect the administration against the civil courts, and therefore against legal proceedings by private persons, it now exercises exactly the opposite function, to protect the citizen against unconscionable and illegal acts by the State and its subordinate authorities. It is true that it does not give a remedy against an official; but no plaintiff wants a remedy against an official if he has a remedy against the public

¹ Dicey, *op. cit.*

² It will readily be admitted that French judges as a whole are not as independent as English judges. See Ensor, *Courts and Judges*.

authority which employs him. In England a plaintiff cannot sue an official of a public health authority acting in the course of his duty¹; but no complaint has been made, because an injured person can sue the public health authority itself for damage caused by any illegal act (other than a mere breach of duty, for which the remedy is complaint to the Minister of Health) and also for compensation for an injury caused by a legal act.² No plaintiff thinks of suing a servant earning £4 a week when he can sue a local authority with an income of a million pounds a year. So much is this so that it is uncertain whether acts done by local government officers in the course of other duties render the officer liable. The authority is liable, and no other remedy is required. In France, the authority is liable in an administrative court; and if the act of the official was also a wrongful act on his own account, he also is liable, though in a civil court.

THE TRUE NATURE OF FRENCH ADMINISTRATIVE LAW

READERS of modern books on French administrative law can no longer be in doubt as to what administrative law is. It is a system of rules determining the constitution and powers and duties of the administrative authorities. It is the law relating to the administration. In France that part of the law which deals with proceedings against public authorities (*contentieux administratif*) is administered in special courts. In

¹ Public Health Act, 1875, s. 265; Public Health Act, 1936, s. 305.

² The liability for tort is under the common law, and the special right to compensation under the Public Health Act, 1875, s. 308, and the Public Health Act, 1936, s. 278. See the numerous cases quoted in Jennings, *Law of Public Health*, pp. 340-5 and 365-70.

some other countries it is not. In Belgium, for example, there is an administrative law which has incorporated some of the ideas of French administrative law, though it is enforced by the ordinary courts.¹ Many Belgians consider that special courts are desirable, and they look with envy on the magnificent *jurisprudence* of the Conseil d'État.² For administrative law can only with difficulty be fitted within the narrow confines of the civil law, and the Belgian courts have been able to give the citizen effective remedies only by a series of extensions of juridical concepts which bear comparison with the extension of the notion of "court" which has enabled English judges to use the judicial writs of prohibition and certiorari against administrative authorities. They have, indeed, been more successful than English judges, for while they have been able to make the administration liable to civil actions on the assumption that it is a *personne morale* (a corporate person capable of being sued under the civil law), the immunity of the Crown has prevented the English judges from affixing liability except where the authority has been established as a separate statutory entity.

THE LAW AS TO REMEDIES IS A SMALL PART OF ADMINISTRATIVE LAW

It must not be thought, however, that the emphasis in administrative law on the continent rests upon legal proceedings. The rules as to judicial proceedings

¹ See Vauthier, *Précis de Droit Administratif de la Belgique* (1928).

² Vauthier, *op. cit.*, p. 508; Vauthier, "La Responsabilité des Pouvoirs Publics en Belgique," *Revue de l'Administration et du Droit Administratif de la Belgique*, 1936, pp. 245 *et seq.*

(*contentieux administratif*) form but a small part of the law. For the most part it deals with the organisation and powers of administrative authorities.¹ For that

¹ It is difficult to state this more positively; yet some students who have read the first edition of this book, where the phrase appeared, still insist either that administrative law does not exist in England, or that it has developed recently through the conferment of "legislative" and "judicial" powers on ministers. Perhaps my statement can be proved by summarising the tables of contents of two very well-known continental books for students. Hauriou's *Précis de Droit Administratif* is the most popular elementary textbook on the French law. Orlando's *Principii di Diritto Amministrativo* was the recognised textbook in pre-war Italy, where the separate courts of the French system did not exist.

<i>Hauriou</i>	<i>Orlando</i>
Definitions	The Subject
Administrative Organisation:	Administrative Organisation:
(a) General principles.	(a) Central authorities.
(b) The State.	(b) Relations between public authorities and the State.
(c) Local authorities.	(c) Local government.
(d) Public utilities.	
(e) Legal personality and legal liability of public authorities.	
The Exercise of Powers	
Powers of Public Authorities:	Powers:
(a) Police, rules and orders, poor law, medical assistance, maternity, etc.	(a) Judicial powers, fundamental rights, police, and compulsory acquisition of property.
(b) Military and civil recruitment, civil service salaries, pensions, compulsory acquisition of property, public works (including markets, railways, mineral concessions, etc.), taxation, and public debts.	(b) Social services.
(c) Property and contracts of public authorities.	

reason, continental lawyers read with surprise the statement of the Lord Chief Justice¹ that "there is not here any system of administrative law, such as is to be found on the Continent." For this means to them that England has no administrative authorities. But when he goes on to explain "whereby disputes in

Proceedings against public authorities. Judicial control of the administration.

State contracts and public debts.

It may be noted that in Hauriou the rules relating to the *Conseil d'État* and the other administrative courts, together with those relating to the *Tribunal des Conflits* (i.e. almost the whole of that part of *droit administratif* which Dicey called *droit administratif*) are in the last chapter, and occupy 30 pages in a volume of 450 pages. Similarly the rules relating to judicial control by the *civil* courts occupy a single chapter in Orlando.

A continental lawyer who set out to write a book on English administrative law would use something like the following table of contents:

- I. General Principles.
- II. The Organisation of the Administration:
 - (a) The Crown and the Central Departments;
 - (b) Local authorities;
 - (c) Independent statutory authorities and public utilities.
- III. Methods of Administration and General Powers:
 - (a) Ministers and the civil service;
 - (b) Local government committees and the local government service;
 - (c) Central control of local government;
 - (d) Control of other statutory authorities and public utilities;
 - (e) Finance (i) central,
(ii) local;
 - (f) Contracts, and compulsory acquisition of land.
- IV. Powers:
 - (a) Central, including the royal forces, foreign affairs, Post Office, social insurance, factory inspection, etc.;
 - (b) Local, including police, public health, poor law, education, maternity and child welfare, etc.
- V. Judicial Control of Public Authorities.

¹ Introduction to Sir Maurice Amos, *The English Constitution* (1930), p. vi.

which servants of the Government are concerned are decided in accordance with a special system of law, and in special administrative courts," they realise that there must be some misunderstanding. For disputes in which servants of the Government are concerned are decided in France in accordance with the civil law and in the civil courts. If, however, the act of the servant implicates the Government, the dispute is with the Government, and in France it is determined by a system of law which recognises that the Government ought to be liable, but according to principles which differ from those applying to private citizens. But this, the French lawyer would explain, is a small part only of administrative law, and is by no means necessary to a legal system, for other continental countries do not necessarily copy this characteristic of French administrative law. A system of law like English law, which theoretically allows the Government to escape liability, would be a most unfair sort of law, but it would still be administrative law.

In fact, however, a French lawyer whose knowledge of English administrative law was taken from Dicey has just as wrong an impression as the English lawyer who takes his knowledge of French administrative law from the same source. For though Dicey omitted the special prerogatives of the Crown which enable the Government to escape liability, and so gave too favourable an impression, he also omitted the prerogative writs and other remedies, which enable the administrative authorities to be *controlled* almost as well as the Conseil d'État controls the French administration. Also, not being interested in *powers* of government, he

failed to point out that there is usually a statutory remedy wherever a public authority has power to interfere with private rights.¹

¹ The confusion into which a continental lawyer may be led is well illustrated in Orlando, *Principii di Diritto Amministrativo* (2nd ed.), pp. 311-12, where it was stated that there were four systems of judicial control, viz.:

(1) *Self-government*, as in England, where decisions are taken by local authorities exercising both administrative and judicial functions under the control of the superior courts.

(2) The French system.

(3) The Prussian system.

(4) The Italian system, which began in Belgium and Holland and has been applied in Sweden, Norway, Denmark, and Greece: here the control was vested in the civil courts.

This appears to be a combination of Gneist (who was concerned primarily with the justices of the peace) and Dicey. Orlando apparently thought that where a person suffered wrong from an administrative authority, he appealed to a local authority.

THE COURTS AND THE CONSTITUTION

§ 1. *The Courts*

THE COURTS IN A WRITTEN CONSTITUTION

A WRITTEN constitution usually establishes a Supreme Court and provides for the establishment by legislation of inferior courts. It then sets out the principle that the "judicial power" is vested in these courts. It is never easy to determine precisely what "the judicial power" is.¹ It has been pointed out in Ch. I that the judicial function and the administrative function do not differ in essence, though in the one the meaning of the law may be the primary question, while in the other the exercise of a discretion is likely to be the more important. Where a written constitution makes the separation, some criterion must be found, in order that the courts may declare to be void those legislative provisions which place some duty on the courts which is held not to be judicial or which give to some authority other than the courts a function which is held to be judicial. But no such distinction is necessary in England; it will be seen from Appendix I that the courts exercise many functions which involve a

¹ For the United States of America, see Willoughby, *Constitutional Law of the United States*. For Australia, see Kerr, *The Law of the Australian Constitution* (1925), Ch. XXVII; and see especially *Waterside Workers' Federation v. J. Alexander, Ltd.*, (1918) 25 C.L.R. 434.

substantial discretion, while almost every decision of an administrative authority involves a question of law.

THE COURTS IN ENGLAND

CONSEQUENTLY it is rather difficult to define what precisely are in England "the courts." We know that the High Court and the Court of Appeal are courts. We have no difficulty in asserting that the county courts are courts. We must assume that sometimes, at least, the House of Lords is a court. Yet, as is explained in Ch. III, it is very difficult to separate the two functions of the House of Lords; and if we regard it as being always a court, we must admit also that the House of Commons is a court. For the Lower House, too, punishes for contempt and for breach of its own privileges, and interprets the laws which apply to it.

Moreover, the writs of prohibition and certiorari, which are the most important instruments for annulling acts of administrative authorities when they are not authorised by law, are available only against "inferior courts." In consequence the High Court has had to decide that whenever an administrative authority takes a decision it acts as a court.¹ "There has been a great deal of discussion," Lord Justice Scrutton has said,² "and a great number of cases extending the meaning of 'court.' It is not necessary that it should be a court in the sense in which this court is a court; it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on

¹ See my *Principles of Local Government Law*, pp. 246-52.

² *Rex v. London County Council, ex parte Entertainments Protection Association, Ltd.*, [1931] 2 K.B. 215.

evidence between a proposal and an opposition; and it is not necessary to be strictly a court; if it is a tribunal which has to decide rights after hearing evidence and opposition, it comes within the writ of certiorari." This function is being exercised every day by a host of administrative authorities.

NO FUNCTIONAL DISTINCTION

THE truth is that no distinction can be drawn according to function and the judicial function does not exist as something clear and definite. We can only say that certain courts are courts because they have always been called courts. They are the High Court, the Court of Appeal, the House of Lords, the Judicial Committee of the Privy Council, the county courts, the courts of quarter and petty sessions, and certain local courts. What they do, in the main, is to administer the civil and criminal law. But, as we saw in the last chapter, they exercise certain functions in regard to administrative law. They hear appeals from some of the decisions of administrative authorities, they compel statutory authorities to carry out their duties and keep them within their statutory powers, and they decide cases in which proceedings are taken against administrative authorities.¹

CHARACTERISTICS OF THE COURTS

THESE courts have three characteristics. The first is their subordination to the legislature. In this they are like the administrative authorities; and indeed this characteristic is nothing more than the supremacy of

¹ See *ante*, pp. 196-207.

Parliament looked at from the point of view of the courts. They do not receive their powers from a constitution. They used to take them from the common law; they took them because they had successfully claimed them. For they developed the common law, and they therefore declared what their own powers were. Now they are, almost without exception, statutory bodies, exercising those functions which statutes have accorded to them. Since, however, the statutes giving powers to the High Court refer to the powers possessed by its predecessors, the effect is that the High Court exercises certain powers derived from the common law and certain powers derived from statute. In any case, these powers can always be diminished or increased by legislation. It is not possible for the courts to refuse a jurisdiction on the ground that it is not a "judicial" function. Nor is it possible for them to claim a jurisdiction which is vested by statute in an administrative authority. They have recognised the claim of Parliament to pass legislation on any subject whatever and to make what provision it thinks fit, and they are therefore bound by it.

NO POWER TO OVERRIDE LEGISLATION

IN this they differ from the courts of some other countries, such as those of the United States, Australia, and Ireland. There, the first question which has to be answered is whether the legislation is valid under the Constitution. If the legislation deprives the courts of part of the judicial power, or gives judicial functions to other authorities, the courts will declare it invalid. The English courts, like most of the continental courts,

have no such power. It is their function to apply and to interpret. They may do their best to increase their own powers and to diminish the "judicial" powers of other authorities, by the appropriate interpretation. But if the words are clear enough they are bound by them.

INDEPENDENCE OF THE COURTS

THE second characteristic of the courts is their independence of the administrative authorities. The judges of the superior courts are deliberately placed in as independent a position as the law can place them. Unlike most other Crown servants, they are not dismissible at the King's pleasure, but under the Supreme Court of Judicature Act, 1925, re-enacting the provision first inserted in the Act of Settlement, they hold their commissions *quamdiu se bene gesserint*. They can be removed—and this perhaps means that they can be removed *only*—on an address from both Houses of Parliament. Their salaries, too, are not voted annually like those of most other Crown servants, but are permanently charged upon the Consolidated Fund. Thus their administration cannot be debated in Parliament when the Civil Estimates are presented, as can the administration of most other Crown servants. Indeed, it is a rule of Parliamentary procedure that a judge is not to be criticised except upon a substantive motion. Further, they are immune from proceedings of any sort for any action which they may take or words which they may speak when acting in their judicial capacity.¹

¹ *Scott v. Stansfield* (1868), L.R. 3 Ex. 220; *Anderson v. Gorrie*, [1895] 1 Q.B. 668.

Nor does it matter that they are alleged to have acted maliciously, with the deliberate intention of injuring some person involved in the litigation.

In short, they are immune from administrative control, from Parliamentary discussion, and from legal proceedings. This does not, however, apply in its entirety to judges of inferior courts. County court judges can be dismissed by the Lord Chancellor for inability or misbehaviour, and justices of the peace can be struck off the commission of the peace without any cause being shown. The salaries of county court judges and metropolitan police magistrates are, however, charged on the Consolidated Fund. Justices of the peace have no salary. County court judges are protected against judicial proceedings unless they knowingly act without jurisdiction, and probably the same rule applies to justices of the peace.¹

CONTROL AND BIAS

IN spite of these limitations, the judges of lower courts are in practice as independent as those of the superior courts.² This indicates that the independence of the judges depends rather upon a general feeling that judges ought to be independent, and in particular upon the independent spirit of the legal profession, than upon the forms of the law, though the forms were useful in establishing the tradition and must be main-

¹ See Justices Protection Act, 1848; Wade and Phillips, *Constitutional Law* (2nd ed.), p. 258.

² But certain justices of the peace who were said to have failed to carry out the emergency regulations issued during the General Strike of 1926 in accordance with the Emergency Powers Act, 1920, were removed from the commission.

tained to assist the maintenance of the tradition. The demand for judicial independence rests upon a belief that the judicial function demands impartiality. Strict impartiality is, of course, unattainable, for it involves not merely the absence of control but the absence of prejudice. Judges do their best to achieve impartiality, and in private matters they usually succeed. Much administrative law, however, consists of legislation directed to social ends. It can never be so precise as to leave no scope for differing interpretations, nor are the rules of interpretation so definite that the judge can altogether exclude consideration of the policy. Where, for instance, a statute gives a public authority power to interfere with private rights, that power may sometimes be interpreted either narrowly or widely—"liberally," as it is sometimes put. Judges in fact differ on these matters, and it is sometimes possible to forecast on which side a particular judge will be found. It is quite impossible to exclude subjective notions.

Nevertheless, the bias which comes from the inevitable unconscious prejudice is very different from the bias which comes from control. In most matters which come before the courts the prejudice of the Government is the same as that of the courts, for it is part of the prevailing social philosophy. Nevertheless, the judges do seek to maintain impartiality, and are clearly less biased than a Government which has come into power by capitalising the prejudices of a majority of the electors. This is particularly the case where the Government is an interested party in the litigation. Many Governments have confounded sedition or

treason and criticism of themselves. All Governments have an interest in favouring one group of persons at the expense of another. Freedom of speech means freedom to criticise the established order (including, of course, the judges). Freedom of association means freedom to combine against those in power. The right of public meetings means the right to organise protests against the Government. Freedom from arrest except for breaches of the law means freedom from arrest at the hands of the agents of the Government. If these most important rights are to be maintained, they must be maintained by those who have freedom to decide against the Government and its agents.

THE ADMINISTRATION AND THE COURTS

THIS does not mean, as some have taken it to mean, that all decisions about the rights of individuals must be taken in the courts and not by administrative officers. It is no argument against "administrative justice." It is an argument against giving the right to decide to an administrative body when that body, or any authority controlling it, has an interest in the decision. Where there is no such interest, the division of functions between the administration and the courts depends upon the capacities of the two branches. Where expert knowledge is required, the expert may be the appropriate person to decide; where knowledge of ordinary life is required, then the judge who comes into contact with ordinary life may be more appropriate. Where the element of policy is most important, the decision should rest with the officer who is capable of comprehending it, whether he be judge or administra-

tor. Moreover, the judge and the administrator decide according to different methods, and choice of method may determine the allocation of the right of decision.¹

THE JUDICIAL METHOD

THE methods of the courts are their third characteristic. A court is, normally, held in public. The parties may be represented by trained lawyers. The evidence is given in open court. It is produced by examination and cross-examination. The limits of the case are determined by written pleadings or by a formal charge. The procedure is regulated by rules which are, in the main, inelastic.

THE IMPORTANCE OF THE OPEN COURT

THE importance of the open court may easily be exaggerated. It means only that a few members of the public *may* be present and that the newspapers *may* report some part of the case if they think it interesting enough. This is certainly of considerable value, for the mere fact that information may leak out would generally be sufficient to prevent unorthodox means of reaching a decision. Nevertheless, influences which might bias the decision would rarely appear openly. What prevents bribery and corruption or obvious partiality of the judge is not only the openness of the court, but also the traditions of the legal profession. The effect of openness is rather illogical; the individual believes that because he could, if he wished, go into court to see what was going on, justice must be done. All that really happens is that justice appears to be

¹ See Appendix I, *post*, pp. 265-70.

done; and there are plenty of ways by which the administration of justice could be corrupted if judges permitted it. The reason that English justice is never accused of being corrupt is that English judges not only do not allow corruption, but also would take strong steps against any person who made any effort to corrupt.

EVIDENCE

THE other characteristics of English judicial process necessarily limit its application. Facts can be proved in evidence, and cross-examination helps the court to reach something approaching the truth. But the sort of problem which modern government has to face rarely involves simple facts which can be produced in this way. Many of the decisions which have to be taken imply considerable expert knowledge. Experts can of course give evidence and may be able to explain matters in a sufficiently elementary manner to enable an inexperienced judge to understand. Indeed, judges have experience as counsel of arguing about matters about which experts dispute and, as judges, of deciding them. But even if such a decision can be regarded as satisfactory—and the perils of the layman who ventures into the territory of the expert are well known¹—there are many cases in which the consequence of a decision varies with the person who carries it out. A sanitary expert or a drainage expert or a civil engineer may believe that a certain result could be attained if he were permitted to make the attempt. A surveyor may

¹ For this reason suggestions have been made to associate experts with the courts to act as "assessors," as is done in the Admiralty Division.

report to a local authority that one method of drainage, involving the taking of one person's land, is better than another, involving the taking of some other person's land. He makes that report because he knows that he would control the operation and he knows that the responsibility will be placed upon him if the drainage system does not function as he said it would.

In such cases, even though the property rights of individuals are concerned, what is wanted is not only an "impartial" opinion, but an opinion by a person who will receive the responsibility by giving it practical effect. Perhaps, by way of precaution, another expert opinion may be desirable. The local authority may call in a consultant, or the Minister of Health may send down an inspector. But certainly the courts would have difficulty in determining whether the one person's land should be taken, or whether the alternative course should be selected and the other's land taken.

Similarly, matters of policy cannot be proved in evidence. If a discretion is to be left to any authority, then it should be an authority familiar with the policy. The courts may be asked to assess criminal penalties because it is part of their duty to consider problems of punishment.¹ But in other spheres of Governmental activity there are questions of locality and questions of practicability which may be known to administrative officers because of their experience, but unknown to the courts.

¹ As one who does, I may repeat the statement in the first edition: "It may be doubted whether they do it adequately." We do our best, but I am sure we could do it better if we had more knowledge and were able to call for more assistance from administrative authorities.

§ 2. *The Functions of the Courts*

THE TWO GROUPS OF FUNCTIONS: (1) ADMINISTRATION
 THE functions of the courts, as has been indicated, may be divided into two groups. The first group contains the functions which the courts administer, namely, ordinary civil and criminal justice. The element of discretion may be large, as in the administration of criminal justice; or it may be small, as in the administration of the law of contract and tort, where the discretionary power is limited to the fixing of the amount of damages, the consideration of whether special remedies (such as orders for specific performance and injunctions) shall be used, and the determination of the method of levying execution, if necessary. Nevertheless, the element of discretion is usually present. This function, therefore, is essentially the same as the functions of administrative authorities. These authorities, too, have greater or less discretion. The Minister of Pensions has few discretionary powers, and there is little discretion attached to the administration of unemployment insurance.

(2) JUDICIAL CONTROL

THE second group of functions is the judicial control of the administrative authorities. This control is exercised in three ways. From some authorities an appeal lies to a court of law. The income tax payer may compel the General or Special Commissioners to state a case to the High Court. The ratepayer may appeal against his assessment to a court of quarter sessions. A property owner may appeal against a demolition

order to a county court. A frontager may sometimes appeal against a charge for making up a street to a court of summary jurisdiction. This is the first method of control, available only where such a right of appeal is specifically given by statute but usually provided for where questions of legal interpretation are likely to be raised.

The second method of control enables the courts to keep administrative authorities within their legal power. A prerogative writ, an injunction, or a declaration of illegality¹ may be issued to prevent an illegal act or to compel the performance of a legal duty. For this, no statutory power is necessary. For the courts have assumed such a power, have "found" it within the elastic boundaries of the common law. If it is intended to prevent such judicial interference with administration there must be an express statutory prohibition, as there is in certain circumstances in the modern law of housing and of town and country planning.² For the courts will not easily be persuaded to regard themselves as deprived of the jurisdiction.³

The third method of control consists in the use of the ordinary remedies for proceedings where a public authority has committed unlawful acts, and so injured a private individual or another public authority. This branch of the law, as is explained in the last chap-

¹ For these remedies, see *Principles of Local Government Law*, Ch. IX. For the last in particular, see Jennings, "Declaratory Judgment against Public Authorities in England," 51 *Yale Law Journal*, pp. 407-24.

² Housing Act, 1936, 2nd Sched.; Town and Country Planning Act, 1932, s. 8 and 1st Sched., Part II.

³ Cf. *Minister of Health v. The King, ex parte Yaffé*, [1931] A.C. 494.

ter, is very defective, and is not efficient where the public authority can shelter itself behind the Crown.

IMPORTANCE OF JUDICIAL CONTROL

THE judicial control of administration plays an important part in administration. The appeal is not always an effective constitutional instrument. For if the administrative function is given to an administrative authority, it is usually because some expert knowledge is required, or some acquaintance with the general policy of the country in that aspect of administration, or because the procedure of the courts is cumbrous and ineffective. An appeal to the courts in such a case is an appeal from an efficient tribunal to a less efficient. It is of value only where the possibility of miscarriage of justice outweighs the defects of the judicial process. This is so, for instance, where the authority has an interest in the result or is believed to have such an interest (as in income tax cases); it is so, too, where there is any possibility of corruption (as in some of the functions of local authorities); and, above all, it is so in any case where political influence may affect the decision. The need for an appeal to a court in these cases is obvious; but it does not follow that an appeal to a higher administrative authority may not sometimes be better.¹

The second and third methods are more important. They are the subject's protection against the warping of the law by bureaucratic zeal or partisan govern-

¹ It is generally believed that the right of appeal to a county court from a demolition order is much less effective than the right of appeal to the minister, which existed before 1930 and was transferred to the county court on account of expense.

ment. The courts are not perfect instruments for this purpose. For judges, like other administrators, naturally believe that their own branch of the Governmental machinery is the most important. They do not always welcome the encroachment of administrative powers upon the civil and criminal law.¹ The common law, which knew not the modern social services, imposes on them the duty of interpreting restrictively legislation which interferes with property rights and with freedom of contract, and which establishes Governmental monopolies. Yet these are the essential objects of modern administrative law.² Nevertheless, such an attitude

¹ Cf. Lord Hewart, *The New Despotism* (1928).

² Cf. Lord Haldane in *Local Government Board v. Arlidge*, [1915] A.C. 120 at p. 130—an admirable statement which has not been followed; and cf. the opposing opinions of Greer L.J. and Slesser L.J. in *Consett Iron Co. v. Clawering*, [1935] 2 K.B. 42. The difference between the policy of the common law and the policy of the courts is by no means great. The one or the other or both can be seen to be operating in most branches of modern administrative law. For examples, see Jennings, "Courts and Administrative Law," *Harvard Law Review*, Vol. XLIX, p. 426. For examples drawn from the Canadian Constitution, see Jennings, "Constitutional Interpretation—The Experience of Canada," *Harvard Law Review*, Vol. LI, p. 1. And for instances where strange results followed merely because the nature of the problem was not understood, see Jennings, "Judicial Process at its Worst," *Modern Law Review*, Vol. I, p. 111. The attitude of some courts is sufficiently explained by the following quotation from the speech of Lord Wright in *Rowell v. Pratt* (1937), 53 T.L.R. 982, at p. 983, dealing with the interpretation by the Court of Appeal of s. 17 of the Agricultural Marketing Act, 1931: "It is inevitable that a court of law should approach in a critical spirit any legislation which is calculated to impede a court in the discharge of its duty to administer justice by preventing it from obtaining any material evidence of a nature likely to assist it to ascertain the truth. Hence a court will be disposed, as was the majority of the Court of Appeal, to construe the section, if possible, so as to avoid that result. Now it is true that if the words of an enactment are fairly capable of two interpretations, one of which seems to be in harmony with what is

does prevent administrative interpretation from stretching the law in the opposite direction. Though it does not prevent the stultification of the official, it does prevent the oppression of the individual.

The courts are free to act, however, only within a sphere of small diameter. For the possibility of interpretation is limited by the legislation passed. If legislation results in oppression the judges are powerless to prevent it. In England the judges are the censors of the administration, but they are bound by Acts of Parliament. But "Parliament" means a partisan majority. A victory at the polls, obtained, perhaps, by mass bribery or deliberate falsehood or national hysteria, theoretically¹ enables a Party majority to warp the law so as to interfere with the most cherished of "fundamental liberties."

just, reasonable, and convenient, while the other is not, the court will prefer the former. But if the words properly construed admit of only one meaning, the court is not entitled to deny to the words that meaning, merely because the court feels that the result is not in accordance with the ordinary policy of the law or with what seems to be reasonable. The court cannot mould or control the language. This is particularly true of legislation in these days, when Parliament has established so many new institutions and bodies, and has imposed on individuals so many duties and disabilities for which in the former law no precedents can be found." Later he said: "For myself, I find the language of section 17 (2) clear and unambiguous, and not even difficult when read as a whole." The other lords agreed; and, as Lord Maugham pointed out, there was a very good reason for the provision in question, a matter of justice, convenience, or policy which overrode the mere convenience of the courts. If the quotation be generalised, it being understood that the "policy of the law" includes many principles, it expresses everything which is intended to be conveyed by the statements in the text above.

¹ I add the word "theoretically," because I do not think it possible so long as the democratic system operates. There is no real protection, except the threat of revolution, for the democratic system itself.

CHAPTER VIII

FUNDAMENTAL LIBERTIES

THE PROTECTION OF MINORITIES

THE fundamental principle of democracy is that government shall be carried on for the benefit of the governed, and, since it is considered that only the governed themselves can determine what is for their benefit, under their control. The object of most constitutions is to set up machinery by which the wishes of the governed may determine the nature of the government. It is never entirely successful. But even if it were it would leave unsolved one most important problem. The wishes of the governed mean at best the wishes of a majority of them. Yet the minority, too, is composed of excellent persons, perhaps more intelligent and certainly less orthodox. The problem of government, therefore, is not only to provide for government by the majority, but also to protect the minority.

It is not possible to prevent the government, supported by a majority, from interfering in accordance with law with the liberty and property of a minority. It is not desirable that the attempt should be made. But there are certain rights which are commonly recognised as essential for effective social life and which, being considered to be inherent in the idea of justice, should be protected even against the majority.

Exactly what they are depends upon the state of opinion and the organisation of society. If religion is militant, protection may be needed by those who profess a religious belief not accepted by the majority.¹ If education is the passport to a full life, free education may be made compulsory.² If the means of production are not equally distributed, the right to sustenance may be the most insistent of the demands made.³

GOVERNMENT BY OPINION

THERE are some rights, however, which are inherent in a system of government by opinion. For this system implies the right to create opinion and to organise it with a view to influencing the conduct of government. There can be no such system if minority opinions cannot be expressed, or if people cannot meet together to discuss their opinions and their actions, or if those who think alike on any subject cannot associate for mutual support and for the propagation of their common ideas. Yet these rights are those most likely to be attacked.⁴ For those in power can, *ex hypothesi*, continue in power only so long as they command the support of the majority. If a sufficient section of the majority is converted to the views of a large section of the minority, their right to govern is gone, and at the next general election they lose the attractions of office.

¹ English law gives no such protection, but most of the penal laws discriminating against religions have been repealed.

² Cf. Education Act, 1870: Constitution of the Irish Free State, Art. 10.

³ See Poor Law Act, 1930, s. 15.

⁴ Cf. H. J. Laski, *Liberty in the Modern State* (1931).

FUNDAMENTAL RIGHTS

THE problem is not merely one of limiting the powers of the administration. Its solution involves limiting the powers of the legislature as well. For it is normally the majority of the legislature which claims to represent most closely the opinions of the majority of the population. It is therefore usually regarded as desirable not only that the ordinary law shall protect the right of free speech, the right of association, and the right of public meeting, but also that the powers of changing the law, whether by legislation or administrative regulation, shall be so restricted that these rights may not be interfered with.

With a written constitution, this is an end which in principle is fairly easy to accomplish. Certain "fundamental rights" are inserted in the constitution, and every institution of government is forbidden to change them. A fundamental right can then be limited or taken away only by constitutional amendment, and if the process is in any way difficult or formal, such a limitation becomes plain for all to see. Nearly all written constitutions contain such provisions, though with varying definiteness of expression. Nearly all of them, too, provide for freedom of speech, freedom of association, and freedom of assembly.

DIFFICULTIES: (1) NEED FOR SPECIAL MACHINERY

THREE difficulties at once suggest themselves. The first is that the protection may be very ineffective if there is no machinery for determining when a fundamental right is being infringed. In the United States

of America this function was assumed by the Supreme Court. In countries which follow the French tradition this is regarded as a usurpation by the judicial authorities of a function which does not rightly belong to them. For the question is one between the legislature and the electorate, which the courts are considered incapable of settling. But where the American precedent is followed, as it is in many countries, the consequence is to place upon the courts the duty of acting as guardians of fundamental rights.¹

(2) CHANGING IDEAS OF WHAT IS FUNDAMENTAL

THE second difficulty is that what are regarded as fundamental rights by one generation may be considered to be inconvenient limitations upon legislative power by another generation. For example, the fifth and fourteenth Amendments to the Constitution of the United States prevented the United States Congress and the legislatures of the States from depriving any person of life, liberty, or property "without due process of law." This has been used by the Supreme Court to limit very seriously the enactment of social legislation dealing with such matters as hours of labour, minimum wages, and workmen's compensation.²

¹ Under the Spanish Constitution of 1931 there was a special Court of Constitutional Guarantees to which any person injured had access: Spanish Constitution, Art. 121, and see Serrano, *La Constitución Española*, pp. 325-8.

² Frankfurter and Landis, *The Business of the Supreme Court* (1928), Ch. V. Since 1936 the court has tended to be more "liberal"; but (1) a considerable amount of litigation has been necessary, and (2) a President and Congress based upon huge majorities have been considerably limited in the proposals made and passed respectively (and not alone in the interests of the separate States).

This is due, perhaps, as much to the beliefs of some of the judges of the Supreme Court as to the framers of the Constitution. It is nevertheless clear that the provisions of a constitution drawn up before the development of modern industrial society are likely to lead to such complications.

(3) THE RIGHT CANNOT BE ABSOLUTE

THE third difficulty is that even the rights of free speech, of association, and of assembly cannot be regarded as being without limitation. They may be used not for creating opinion in order to turn out the Government by lawful means, but to persuade a small minority to use force to coerce the rest of the population. In their extreme meanings, the rights conflict with the fundamental requirements of public order. National emergencies, too, may demand a limitation upon the rights of individuals which would not be permissible in ordinary times. Two consequences follow. The first is that limitations must commonly be placed upon the rights expressed in the constitution, thereby making them much less effective in practice. The second is that some special provision must be inserted or implied for times of emergency, thereby depriving a minority of its rights just when the majority is least capable of rational appreciation of the contentious nature of its own ideas and when, therefore, the minority stands most in need of protection.

FUNDAMENTAL RIGHTS IN ENGLAND

SINCE the United Kingdom has no such written constitution, there are no fundamental rights in this sense.

If it is attempted to talk about such "rights" in England, it becomes at once apparent that the word is ambiguous. Certain "rights" were inserted in the American Declaration of Independence because they were regarded as natural rights of man. "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights, governments are instituted among men deriving their just powers from the consent of the governed, that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundations on such principles, and organising its powers in such form, as to them shall seem most likely to effect their safety and happiness. . . ." Fundamental rights were therefore inserted in the constitutions of the States, and the First Congress of the United States proposed amendments to the Constitution of the United States, of which ten were accepted and became known as the American "Bill of Rights." Thus the "natural rights" became rights given or recognised by positive law. They are binding upon the Congress and are applied by the Supreme Court to determine the validity of legislation.

These rights were founded essentially upon English traditions, and, indeed, upon the apologia of the Revolution settlement made by John Locke. The American Bill of Rights goes further than the British practice of the eighteenth century, for the American Revolution was a protest against the tyranny of George III and

his ministers. In large part, however, it repeats the substance of English experience. The other famous set of political principles, or fundamental or natural rights, the French Declaration of the Rights of Man, promulgated by the Assembly of 1791, was also founded upon British traditions and experience, though moulded by the political philosophy of the era that preceded the French Revolution. The Constitution of 1791, to which it was the preface, has long since rolled into the dust, yet French constitutional lawyers continue to recognise the validity of its principles, either as principles of natural law, or as essential principles of political action in a free and democratic country. In Great Britain, too, the validity of the essential principles of the American Bill of Rights or the Declaration of the Rights of Man remains almost uncontested. The immediate result of the French Revolution was to create a revulsion in England, and from 1789 to about 1820 there were few fundamental rights which were not denied in practice; yet Charles James Fox and his Whig successors, though in a hopeless minority, maintained the Whig tradition of the English Revolution, and received valiant support from men who drew their inspiration directly from the French Revolution itself. During the later nineteenth century these principles were not only restored by the repeal of some of the repressive legislation, but extended both in theory and in practice. There are relics of the notorious legislation of the beginning of the last century, and there are other limitations both by common law and by statute law that many would prefer to see abolished. The principles themselves, however, are accepted by all

democrats as being not only necessary to but also implied in free or democratic government. A State is free only because its citizens are free.

We must nevertheless be careful in using the word "rights."¹ If it is meant that they are natural rights,² or if they are accepted as part of the logic of free or democratic government, the word is used in a sense different from its meaning in the phrases "contractual right," "right to damages." It is a distinction between essential constitutional principles and rights actually conferred by statute law or common law. Some writers use the word "right" only as correlative to a duty imposed upon some other person by positive law. If I contract with B to pay him £300 for a motor car, I have a right to the car and I owe a duty to pay the price, while B has a right to the price and owes a duty to deliver the car. Either of us can go to a court to enforce his right. On the other hand, I may enter into a contract with B or any other person, but no person is bound to enter into a contract with me. I may enter into the contract simply because there are no legal restrictions on my doing so. Similarly, I may invite my friends to tea in my house and they may assemble on my invitation not because there

¹ *Peccavi*. This chapter was misunderstood in the first edition simply because I did not explain that I was using "right" in a very definite sense. I ought to have repeated what was said by me in "The Right of Assembly in England," *New York University Law Quarterly Review*, Vol. IX, pp. 217 *et seq.*

² I need not discuss the concept of "natural rights." The attentive reader of Appendix III will discover that I do not support the theory of natural law. That does not in the least mean that I deny that these "rights" ought to exist; and, as I see it, there is no contradiction in these statements

is any "right of assembly" (though, possibly, each may have a contractual right against me), but because there is no law which prevents them from doing so. In this sense, the right of assembly is a liberty, a freedom from restriction. It arises from the tautologous principle that anything is lawful which is not unlawful. There is no more a "right of free speech" than there is a "right to tie up my shoe-lace"; or, if there is a right of free speech, there is also a right to tie up my shoe-lace. The question to be discussed in each case is the nature of the legal restrictions. The "right" is the obverse of the rules of civil, criminal, and administrative law. A man may say what he pleases provided that he does not offend against the laws relating to treason, sedition, libel, obscenity, blasphemy, perjury, official secrets, etc. He may form associations provided that he does not offend against the laws relating to trade unions, friendly societies, religion, public order, and unlawful oaths. He may hold a meeting where and how he pleases so long as he does not offend against the laws relating to riot, unlawful assemblies, nuisance, highways, property, etc.

This principle of the illegality of illegal acts (for it is nothing else) is, too, the simple way of asserting what is called "the right to personal freedom."¹ The right to personal freedom is a liberty to so much personal freedom as is not taken away by law. It asserts the principle of legality, that everything is legal that is not illegal. It includes, therefore, the "rights" of free speech, of association, and of assembly. For they assert only that a man may not be deprived of his

¹ Cf. Dicey, *Law of the Constitution* (8th ed.), Ch. V.

personal freedom for doing certain kinds of acts—expressing opinions, associating, and meeting together—unless in so doing he offends against the law. The “right of personal freedom” asserts that a man may not be deprived of his freedom for doing *any* act unless in so doing he offends against the law. The last is the genus of which the others are species.¹

ESSENTIAL CHARACTERISTICS

THE position is different where the “rights” are set out in a written constitution, for then they govern the restrictions, and restrictions which infringe the rights are not law. With us, the nature of the liberties can be found only by examining the restrictions imposed by the law. We shall proceed presently to examine the restrictions; but for the moment it is essential that three characteristics of the British system should be borne in mind. In the first place, the law can always be altered by Parliament, and it is likely to be altered in time of emergency, such as a war. A Government with a majority in both Houses of Parliament can restrict liberty as it pleases. It must be remembered, however, that in normal times the free tradition is extremely strong in Great Britain, and that it is as noticeable in the House of Commons as elsewhere. There have been several recent examples in which the House, without distinction of Party, has shown itself extremely critical of police action which had a sus-

¹ This is subject to the qualification that loss of personal liberty is not the only method of preventing a person from doing illegal acts. In the absence of a system of outlawry or excommunication imprisonment is, however, the ultimate sanction.

picion of unfair tactics. There is nothing that the House does better than to protest against individual acts of oppression, whether legal or illegal. The proceedings on the Incitement to Disaffection Bill showed, too, that Parliament can in normal times be trusted to protest energetically against any substantial increase of restrictions. It must be emphasised that this is in normal times. In wartime and other times of national hysteria, the dissident minority can expect no more mercy or toleration from the House of Commons than from the Government itself. Indeed, the experience of the war of 1914-18 and of what Mr. Lloyd George rightly called "the worst and nastiest House of Commons," that elected at Mr. Lloyd George's request in 1918, suggests that the Government may on such occasions be more "liberal" than the Government's majority. In such exceptional times the supremacy of Parliament is a very great danger, especially to minorities.

In the second place, Great Britain differs from many other countries, and especially from the dictatorships, in that most restrictions are imposed directly by the law itself. They are to be found for the most part in the criminal law. An act is, therefore, either a crime or not a crime, and it is not left to the Government or the police to determine whether it shall be a crime or not. There are important exceptions, but generally speaking the restrictions on fundamental liberties are to be found in the civil and, especially, the criminal law, and not in administrative powers. Dicey was thinking of fundamental liberties when he emphasised the absence in England of "discretionary or arbitrary powers." In relation to those liberties his analysis was

in principle correct.¹ It is part of the British tradition, which is to be found in the law, that if restrictions are to be imposed on the rights of free speech, association, and assembly, they should be imposed by the law itself and not imposed under police or other Governmental discretion.²

In the third place, though the law itself gives few discretionary powers to the police and other Governmental authorities, there is in practice a very substantial discretion. If an act is a crime it is a crime, and the criminal is liable to punishment unless he can produce a pardon. Any person can lay an information against him, and the judicial process will then continue unless the Attorney-General enters a *nolle prosequi*. In practice, however, private persons do not lay informations in respect of breaches of the restrictions on liberty, and prosecution is undertaken by the police. At the same time, the police are under no obligation to prosecute, and in practice they exercise a substantial discretion. This is particularly true in respect of public meetings. Even where they have no powers to regulate processions and meetings, they in fact do so. They can prohibit a meeting in, say, Market Square, St. Albans,³ simply because the meeting will be an obstruction to a public highway, and therefore illegal. If their prior permission is obtained, it is reasonably certain that they will not prosecute for the offence, though it is no less an offence,⁴ and any other person could prosecute if he

¹ See *ante*, pp. 53-61.

² But see the Public Order Act, 1936, referred to, *post*, pp. 256-8.

³ In relation to St. Albans, I can state as a positive fact that prior consent was always obtained from the police, long before 1936.

⁴ Mr. J. R. Clynes gives a very good example. Labour meetings were held in Boggart Hole Clough, "a sort of park" outside Man-

thought fit. Thousands of public meetings are thus held every week, in defiance of the law, simply because the police exercise toleration. In time of stress, however, the toleration disappears, and the very considerable restrictions upon fundamental liberty in England at once become apparent.¹

What these restrictions are can be determined only by examining those parts of the criminal and civil law which interfere with the accepted fundamental liberties.

FREEDOM OF SPEECH

It is *sedition* to endeavour to degrade the King in the esteem of his subjects, or to create discontent or dis-

chester. Manchester City Council announced, however, that it would prosecute for the offence. Six Labour speakers undertook to defy the prohibition, one each week. The first two speakers were charged and sentenced to one month's imprisonment each. The third was Mrs. Pankhurst. "The authorities were frightened to arrest so notable a woman," and no action was taken. Accordingly the fourth (Mr. Clynes) and subsequent speakers were not interfered with. "So Officialdom looked the other way, the *right* of free speech was vindicated." See Clynes, *Memoirs*, Vol. I, p. 102. (The italics are mine.)

¹ I am not, of course, asserting that this discretion applies only to restrictions imposed on fundamental liberties. The most obvious case of discretion is in relation to the parking of motor vehicles on the highway. Any wait, even for a few minutes, is an obstruction (though it is possible that at some point the maxim *de minimis non curat lex* applies). In practice, the police do not prosecute unless the position is dangerous, or there is a real obstruction to traffic, or the car is left for what they regard as an "unreasonable" time. If they prosecute, the court has no alternative but to find the offence proved. Many motorists, however, think that they have a "right" to park for a reasonable time in, for instance, a cul de sac, and blame the courts of summary jurisdiction for not having a "reasonable" view of what is "reasonable." Motorists must, however, blame the law itself.

affection, or to incite the people to tumult, violence, and disorder, or to bring the Government or Constitution into hatred and contempt, or to effect any change in the laws by the recommendation of physical force.¹ Thus a statement in writing calculated to bring the Government into contempt is a seditious writing, even, apparently, if it is never published. A combination of persons to effect this object is a seditious conspiracy; and an assembly at which any such statements are made is an unlawful assembly.

It is an ordinary criminal libel to publish in writing statements calculated to bring any person into hatred, ridicule, or contempt, even if the statement be true. Blasphemy is such a wide offence that the older books state that any attack on Christianity is crime. Later judges have dissented from that view, but the law is so doubtful that an intolerant Court of Criminal Appeal could make what it pleased of it.²

It is said that the scope of these offences is in practice limited by the necessity of securing a verdict from a jury. "Freedom of discussion," said Dicey with conscious exaggeration,³ "is, then, in England little else than the right to say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written." It would be a strange system of law which relied for limitations on its severity upon the decisions being given contrary to law. But indeed a jury is small protection for minority opinions. The one advantage of

¹ Cf. the definition given incidentally in s. 1 of the Blasphemous and Seditious Libels Act, 1819.

² Cf. Dicey, *op. cit.*, pp. 239-42.

³ *Op. cit.*, p. 242.

the jury system, if advantage it be, is that it secures the opinion of twelve people of the most orthodox class in the community. An orthodox opinion is of small value for the protection of the unorthodox, and all minorities are unorthodox. William Penn and William Mead were fortunate enough to secure a jury of Quakers prepared to bring in a verdict contrary to the evidence.¹ John Wilkes could sometimes rely on a Westminster jury. Carlile and his friends finally persuaded London juries that Tory Governments out of touch with public opinion ought not to prevent all discussion of religion and politics. But no juries protected the victims of the lying information of Titus Oates; and it is unlikely that in the present state of opinion a jury would be anxious to subvert the law in favour of a fascist or a communist.

PROPAGANDA AND THE LAW

THE only protection of a person guilty of sedition is that his sedition may for a long time be secret. Modern revolutionary technique relies upon numerous centres of sedition, or "cells" from which the revolutionary doctrines may be spread by slow but persistent methods of personal propaganda. Manifestos may be written on walls or printed and broadcast without any indication of their origin (contrary to the Newspapers, Printers, and Reading Rooms Repeal Act, 1869). It is illegal for a justice of the peace to issue a "general warrant" for the author or printer of a publication. It must state with some particularity the person to be arrested.² It is unlawful, too, to issue a warrant to

¹ Cf. *Bushell's Case*, (1670) 6 St. Tr. 999.

² *Leach v. Money*, (1865) 19 St. Tr. 1002.

search for papers, if the only charge to be made is one of sedition or blasphemy.¹ But as soon as any person can be reasonably accused of an offence, the law enables that person's papers to be searched. If a warrant of arrest is executed while the accused is at home or in his office, such of his papers as are evidence of his own offence or, apparently, of an offence having been committed by any other person, may be taken away, and prosecutions may be undertaken against the other persons whom the papers implicate.² Thus the method of suppression of a seditious conspiracy is easy once any member of it has been discovered.

Indeed, if one of the members can be prosecuted to conviction for sedition or blasphemy, there is another method which is undoubtedly legal. For by an Act of 1819³ the court in which such a verdict is given may make an order for the seizure of all copies of the libel in the possession of the person accused or any other named person. A house or building belonging to such person may then be searched by the police. Although the statutory power is only to take away the copies of the libel, it cannot be doubted that if any other seditious libels are found proceedings can be taken upon them.⁴

Further, it is necessarily one of the functions of a

¹ *Wilkes v. Wood*, (1763) 19 St. Tr. 1153; *Entinck v. Carrington*, (1765) 19 St. Tr. 1030; there are no less than sixty-five powers for issuing search warrants, but they do not apply to sedition or blasphemy.

² *Elias v. Pasmore*, [1934] 2 K.B. 164.

³ 60 Geo. III and 1 Geo. IV, c. 8, commonly called the Blasphemous and Seditious Libels Act, 1819. It is one of the notorious "Six Acts," though a few of its provisions have been repealed.

⁴ The fact that this power had to be given by statute is a strong argument for the assertion that no papers could be taken under a warrant of arrest. But see *Elias v. Pasmore* (*sup.*), where the contrary was held.

revolutionary movement to secure the support of the police and the army. It is an offence under the Police Act, 1919, to cause, to attempt to cause, or to do any act calculated to cause disaffection among the members of any police force. Similarly, to incite troops to mutiny is an offence under the Incitement to Mutiny Act, 1797. Under the Incitement to Disaffection Act, 1934, a person who endeavours maliciously and advisedly "to seduce any member of His Majesty's forces from his duty or allegiance to His Majesty" commits an offence. Also, a person who "with intent to commit or to aid, abet, counsel, or procure the commission of the offence mentioned above, has in his possession or under his control any document of such a nature that the dissemination of copies thereof among members of His Majesty's forces would constitute such an offence" also commits an offence. In both cases, however, the discretion to prosecute is vested solely in the Director of Public Prosecutions, who acts under the general direction of the Attorney-General. In respect of either of these offences a search warrant may be issued, though only by a judge of the High Court.

In practice, prosecutions for any of the above offences are rare. They are essentially a protection against revolutionary movements. In a dictatorship, revolution is the only means of effecting an overthrow of the Government or achieving an alternative policy. In such a country, therefore, this branch of the law is fundamentally important, is generally even stricter, and confers wide discretionary powers upon the police (as in respect of "protective custody").¹ In a demo-

¹ And cf. the powers of the former G.P.U. in U.S.S.R.

cratic State, on the other hand, an alternative Government may be obtained and an alternative policy achieved by the normal method of the ballot box. For a democratic country, English law is very strict, since much of it dates from the period when the franchise was exercised by a small section of the population, and some of it from the reaction to the French Revolution, when Tories and "moderate" Whigs alike felt the terror of the guillotine and, even more, the threat of expropriation, and when to be a follower of Charles James Fox was to be a "Jacobin." This severity is, however, much mitigated in practice by the tolerance which arises from safety and by the force of public opinion. Though sedition and blasphemy are very wide offences, prosecutions are hardly ever undertaken. Greater care is taken against "subversive" propaganda among the police and the troops, though even here "subversive" has a much narrower meaning in practice than is the case in any authoritarian State. Those sections of the population which might reasonably be described as having ultimate revolutionary aims are extremely small, and their influence tends rather to diminish than to increase. Consequently enforcement of the law of sedition against them is unnecessary—for enforcement is necessary only where open disorder is likely or where the class of criminals is likely to grow. There has been no serious revolutionary movement since the Ulster "covenant" of 1914, which was extremely limited in its aims; and even then it was thought wiser not to enforce the law. Accordingly English law is in practice much more concerned with disorder than with revolution. Dis-

order is likely to arise primarily from public assemblies, and will be dealt with under that heading.

FREEDOM OF ASSEMBLY

AN assembly upon any part of the highway is a public nuisance at common law, which may be prosecuted by indictment. "A claim on the part of persons so minded to assemble in any numbers, and for so long a time as they please to remain assembled, upon a highway, to the detriment of others having equal rights, is in its nature irreconcilable with the right of free passage, and there is, so far as we have been able to ascertain, no authority whatever in favour of it."¹ It is, also, an offence under section 72 of the Highway Act, 1835, to obstruct the passage of any footway or other highway, and it is no defence that the obstruction is of part only of a highway, so that persons not taking part in the meeting can walk around it.² Accordingly any person who takes part in a meeting in Trafalgar Square or any similar place commits an offence.³ If he is ordered by a police constable to "move on," and refuses to do so, he commits the offence of obstructing the police in the execution of their duty.⁴ Nor is there any right to hold a meeting on a common or foreshore.⁵ In the

¹ *Ex parte Lewis* (1888), 21 Q.B.D. 191, at p. 197.

² *Homer v. Cadman* (1886), 16 Cox 51.

³ *R. v. Graham and Burns* (1888), 16 Cox 420.

⁴ *Duncan v. Jones*, [1936] 1 K.B. 218; but this unsatisfactory decision seems to be based on the assumption that moving on was necessary to prevent a breach of the peace.

⁵ *De Morgan v. Metropolitan Board of Works* (1880), 5 Q.B.D. 155; *Brighton Corporation v. Packham*, [1908] 72 J.P. 318. The former case related to Clapham Common and the latter to the foreshore at Brighton. The latter was, however, a civil action, and the former a prosecution under a bylaw.

case of a town or village green or allotment it is an offence under section 12 of the Inclosure Act, 1857, and section 29 of the Commons Act, 1876. Moreover, practically all commons, parks, and other open spaces are subject to byelaws made under statutory authority. It is true that an assembly in itself lawful does not become unlawful merely because it is feared that some other persons may cause a breach of the peace by attempting to interfere with it. But the case of *Beatty v. Gillbanks*¹ in which this doctrine was laid down has been described as a "somewhat unsatisfactory case."² In any case, it was a prosecution for unlawful assembly, not for obstruction to the highway or public nuisance (it related, actually, to a procession, and it seems that a procession need not be an obstruction, since its members are exercising their right of passage; at the same time, it is difficult to imagine a procession that is not an obstruction); and if there is anything unlawful in the conduct of a meeting, it will become unlawful.³

The result is that a meeting can lawfully be held only on private premises with the consent of the owner, or on a public open space or in a park in which there is no right of way, and even then only with the consent of the local authority and subject to its byelaws. Even

¹ (1882) 9 Q.B.D. 308. Dicey, *op. cit.*, Ch. VII, has caused much misunderstanding by assuming that the question was always one of unlawful assembly. No intelligent police officer thinks of prosecuting for unlawful assembly. In any case, many of Dicey's statements are quite inaccurate.

² *Duncan v. Jones*, [1936] 1 K.B. 218.

³ *Wise v. Dunning*, [1902] 1 K.B. 167; *Burden v. Rigler*, [1911] 1 K.B. 337.

when a public meeting is held on private premises, the police have a right to be present if they have any reason to suspect that a breach of the peace will occur,¹ though normally they have no right to enter upon private property without the consent of the owner.² Persons who speak at public meetings are usually not charged with one of the more serious offences, but with using insulting words. By section 5 of the Public Order Act, 1936, "any person who in any public place or at any public meeting uses threatening, abusive, or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned" is guilty of an offence. "Public meeting" includes any meeting in a public place and any meeting which the public or any section thereof are permitted to attend, whether on payment or otherwise. "Public place" means any highway, public park or garden, any sea beach, and any public bridge, road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not; and includes any open space to which, for the time being, the public have or are permitted to have access, whether on payment or otherwise. "Meeting" means a meeting held for the purpose of the discussion of matters of public interest or for the purpose of the expression of views on such matters. Disorderly behaviour for the purpose of preventing the transaction of business at a lawful public meeting is punishable under the Public Meeting Act, 1908, as amended by section 6 of the Public Order Act, 1936. It is also an offence to

¹ *Thomas v. Sawkins*, [1935] 2 K.B. 249.

² *Davis v. Lisle*, [1936] 2 K.B. 434.

have an offensive weapon at a public meeting or procession.¹

Even "preventive detention" is possible under English law, though it requires the order of a court and not merely a decision of the police. For a court of summary jurisdiction may under the statute 34 Edw. 3, c. 1, and the commission of the peace granted thereunder order a person to give sureties to keep the peace or to be of good behaviour "towards the king and his people" or towards any private person. It is not necessary that any particular person should have been threatened,² nor, indeed, that there should have been anything "calculated to lead to a breach of the peace" in the sense of violence.³ In default of compliance with the order, a petty sessional court may order the defendant to be imprisoned for a period not exceeding six months,⁴ though obviously he has committed no offence.

Public processions are usually regulated under local Acts or local byelaws.⁵ In any case, by section 3 of the Public Order Act, 1936, a chief officer of police who has reasonable ground for apprehending that a procession may occasion serious public disorder may give directions imposing upon the persons organising or taking part in the procession such conditions as appear to him necessary for the preservation of public order, including

¹ Public Order Act, 1936, s. 4: but not in pursuance of lawful authority.

² *Lansbury v. Riley*, [1914] 3 K.B. 229.

³ *R. v. Sandbach, ex parte Williams*, [1935] 2 K.B. 192.

⁴ Summary Jurisdiction Act, 1879, s. 25.

⁵ For London, see Metropolitan Police Act, 1839, s. 52; Metropolitan Streets Act, 1867, s. 24.

conditions prescribing the route to be taken and conditions prohibiting the procession from entering any specified public place. Further, the council of a borough or urban district, with the consent of the Secretary of State, and on the application of the chief officer of police, may (subject to certain conditions being satisfied) prohibit for a period not exceeding three months the holding of all public processions or any class of public processions. In the City of London and the Metropolitan Police District the power is exercised directly by the Secretary of State.

Section 1 of the same Act prohibits the wearing of political uniforms (subject to a limited dispensing power conferred upon chief officers of police). Section 2 of the Act makes it an offence for any person to take part in the control or management, or organising and training the members or adherents, of any association organised or trained or equipped for the purpose of enabling them to be employed in usurping the functions of the police or of the armed forces of the Crown, or organised and trained and equipped either for the purpose of enabling them to be employed for the use or display of physical force in promoting any political object, or in such manner as to arouse reasonable apprehension that they are organised and either trained or equipped for that purpose.

Thus English law is strict not only in defence of the Constitution as by law established, but also in defence of public order; and it will be seen from the above references that it has been made stricter in recent years both by legislation and by judicial decisions. It has also become stricter in its administration because of the

development of the technique of the public procession, whether in the form of the "hunger march" or of the "demonstration." Generally speaking, as was said earlier in this chapter, the administration is under the control of the courts, and especially of the justices of the peace. Yet in recent legislation, notably in the Public Order Act, 1936, discretionary powers have been conferred upon the police. In fact, however, the police always have a discretion, since effectively it is they who determine whether there shall be a prosecution or whether a person shall be brought before the court to give sureties (though this is not in itself a reason for conferring more discretion). Once the discretion is exercised, however, the defendant is under the control of the court. In many cases he cannot be arrested without a warrant from a justice of the peace. A person arrested without warrant must be brought before a court of summary jurisdiction as soon as practicable; and if it is not practicable to do so within twenty-four hours of the arrest, a senior police officer must consider whether to release the prisoner on bail.¹ In practice, a prisoner is usually brought before a court within twenty-four hours, and always within forty-eight hours. A person imprisoned, or any person on his behalf, may apply to a High Court judge for a writ of habeas corpus in order that the reason for his imprisonment may be inquired into. Thus, except where discretionary powers are actually conferred, as in the Public Order Act, 1936, the police discretion is only to relax the law, and the police have no discretionary powers of punishment.

¹ Criminal Justice Amendment Act, 1914, s. 22.

In these respects both the law and its administration are more liberal in England than in many other countries. The strictness of the law against disorder is partly to be explained by the practice of allowing a person to advocate what policy he pleases. A dictatorial Government fears disorder far less than opposition, for opposition means revolution. With us, opposition is part of the ordinary constitutional practice. There is an Opposition in Parliament, whose leader, in fact, is paid out of public funds. The whole process of election assumes that there will be candidates against the Government as well as in its support. The "right" to oppose the Government implies a "right" to speak against it and to use all reasonable methods of publicity to that end. This, in turn, involves criticism of individuals and classes; and the boundary between educating the electorate to cast its votes against a Party and inciting the people to acts of disorder against a class must necessarily be fine. The slogan "Workers of the world, unite; you have nothing to lose but your chains," or "Turn out the Jews!" may be a suggestion for a united effort in the polling booths, or it may be a call to riot or rebellion, according to circumstances.

It may be, as is sometimes alleged, that English law is too strict or that the police discretion is not always and everywhere exercised impartially; but there is less danger where substantial powers are under the control of a democratic Government than where they are under the control of a dictator. So long as there are free elections, it is always possible to compel the Government to exercise its powers not too partially, for there is an Opposition to draw attention to abuses and to

persuade the electorate that because of those abuses, if not for other reasons, the Government should be turned out. An opponent of a dictator is an enemy of the State; for the dictator is the State, and he can be dethroned only by revolution. The fundamental liberty is that of free elections, and the others, including some at least of their limitations, follow from it.

APPENDIX I

THE SEPARATION OF POWERS

I

THE theory of the separation of powers applies with strict force only to what the Germans of the new régime call the "liberal-democratic State." Locke and Montesquieu elaborated it in discussing the means by which liberty could be obtained. In authoritarian States liberty does not exist; or at least it does not exist in the traditional sense, for the individual is there considered to find his true liberty in the State itself, and he is, in a sense exactly the reverse of Rousseau's, forced to be free. National-socialist writers therefore deny the validity of the doctrine for the very reason that democrats maintain it, that it imposes limitations on the action of the State or, as a liberal-democrat would put it, on the action of those who assume to act on behalf of the State.¹ In Italy opinion is less settled, and the fact that the fascist hierarchy acts through constitutional forms enables Italian constitutional lawyers to show that fascism does not offend against the true principles of free government but completes and integrates them through the unity of the nation.² In Russia, on the other hand, the doctrine

¹ Walz, "Der Führerstaat," *Deutsches Juristentag*, 1936, pp. 237 *et seq.*; Schmitt, *Staat, Bewegung, Volk*, p. 27; cf. Mankiewicz, *Le National-socialisme Allemand*, Vol. I, pp. 100 *et seq.*

² Thus Chimienti, *Droit Constitutionnel Italien*, pp. 58 *et seq.*, has a tripartite division: (a) legislative, (b) judicial, (c) governmental. Lessona, *Corso di Istituzioni di Diritto Pubblico* (5th ed.), p. 102, divides the essential functions of the State into four categories: (a) governmental, (b) legislative, (c) judicial, (d) administrative. "Executive function" or "executive power" is devoid of meaning and in any case

is denied both in theory and in practice, though the new Constitution is on paper more like a liberal-democratic constitution.

In the democratic countries the doctrine has been the subject of analysis for well over a hundred years. The dangers of unified control, whether it is called tyranny, despotism, leadership, or true liberty, are not denied. It is true also, as a matter of constitutional analysis, that in democratic States the tripartite division exists. This in itself creates a division of powers or functions. The difference of opinion which has arisen¹ is not whether the division ought to be maintained, but whether it corresponds to differences in the nature of the various functions of government, or whether it is not merely a difference in form or procedure which does not distinguish the functions in respect of their nature but which is appropriate to various kinds of functions for a variety of reasons connected with the personnel or methods of operation of the three kinds of institutions. For instance, it may be denied that there is anything which distinguishes a function in the "judicial" class from one in the "administrative" class; but it may be said that a particular function ought to be given to a judge because he is independent of political control, or because he operates in public, or because his training makes him more impartial than an administrator, or because the law of evidence provides the best and safest method of arriving at the facts, or for all of these reasons. This method does involve a classification of functions accord-

useless; the State does not execute the laws, but *acts* according to its powers within the limits of law (p. 103).

¹ See the literature mentioned in Finer, *Theory and Practice of Modern Government*, Ch. VI, and Friedrich, *Constitutional Government*, pp. 524-7. The two points of view are put best in Carré de Malberg, *Théorie Générale de l'État*, Vol. I, pp. 691 *et seq.*, and Bonnard, *Le Contrôle Juridictionnel de l'Administration*, pp. 9 *et seq.*

ing to their nature, but it is not a tripartite classification and does not suggest, for instance, that the function of punishing crimes belongs to the same category as the function of looking after wards of court, or that there may not be some crimes (for instance, certain sexual offences due to physiological causes) which ought to be dealt with by administrators. Where it is asserted that the division exists because the functions of the State have characteristics which separate them into three classes, the concept of the separation of powers is said to be *material*; where this is not asserted, the concept is said to be *formal*.

II

SINCE it will not be denied that a formal separation exists in Great Britain, it will be convenient first to analyse shortly the nature of the functions which are in fact exercised by the three groups of authorities. This method is the more appropriate in that the generalisation made by Locke and Montesquieu was derived from English experience, and the first formal separation was made in the *Instrument of Government*.¹

(1) *Parliament*

The most obvious function of Parliament is to enact general laws. Generality is, however, a matter of degree, and there are always limitations, expressed or implied. It is extremely rare for Parliament to apply its laws to foreigners on foreign territory; and though it is more common to apply legislation to British subjects wherever they may be, the general practice is to legislate only for persons and acts done within the United Kingdom. In case of doubt, the courts assume that this was the intention of Parliament.

¹ Cf. Friedrich, *Constitutional Government and Politics*, p. 146.

Even so, it is rare for legislation to apply to all such persons. Even the laws of most general application, such as those relating to contracts, torts, property, and crime, usually have exceptions in respect of special classes of persons, such as minors, women, and lunatics. Moreover, it is quite common for Parliament to pass laws for special classes of persons, such as owners or drivers of motor vehicles, moneylenders, pawnbrokers, bankers, civil servants, teachers, and so on. It is true that any person is subjected to those laws simply by becoming a member of the class. Frequently, however, the class is itself prescribed by law, so that no person can enter it without some positive act of the State; this applies, for instance, to drivers of motor vehicles, persons licensed to sell alcoholic liquors, owners of public service vehicles, and the like.

Nor is there anything to prevent Parliament from enacting special legislation for particular individuals. Thus Mr. Speaker may be given a pension, or an Act of Indemnity or an Act of Attainder passed. Much of the legislation classed as "local and private Acts" is in the nature of individual decisions. Every year Parliament passes more "private Bills" than "public Bills"; and the former are defined as "Bills for the particular interest or benefit of any person or persons."¹ Such a Bill has to pass through a committee stage of which the procedure is very like that of a court of law; the Bill is founded on a petition and may be opposed by petition, and the committee hears counsel and evidence in support of the petitions.² The Bill may dissolve a marriage, break a settlement of property, modify a charitable trust, empower a public authority or public utility to acquire a piece of land compulsorily, and so on. Where a local authority desires to acquire a particular plot of land compulsorily, it is purely an accident

¹ May, *Parliamentary Practice*, 13th ed., p. 657.

² See Jennings, *Principles of Local Government Law*, Ch. VI.

of history whether the function is exercised by Parliament or by a Government Department; if the land is required for a hospital, an Act of Parliament (confirming a Provisional Order) is necessary, whereas if the same land is required for a block of flats the Minister of Health has the necessary powers.

What distinguishes legislation enacted by Parliament is that it is enacted in accordance with a certain procedure and in a certain form. But Parliament is not concerned only with the making of rules or the pronouncement of decisions in the form of legislation. It is primarily a forum for debate and for criticism of the Government, the chief instrument of self-government; and this is by far its most important function. In addition, there are minor functions of no great importance. The House of Commons can impeach persons before the House of Lords; but this function, though historically of great importance, has fallen into desuetude with the rise of democratic government. Each House can punish any person who breaks its privileges. The House of Lords tries peers accused of treason or felony; and it is, also, a court of appeal in civil and criminal matters for all parts of the United Kingdom.

(2) *The Courts*

It will be obvious from the preceding paragraph and from a previous discussion¹ that it is not easy to define precisely what are the courts. It will be sufficient for present purposes, however, to consider the Supreme Court of Judicature, the county courts, the courts of quarter sessions, and the courts of summary jurisdiction,² together with the similar courts in Scotland. The principal functions of these bodies are the following:

(a) The trial of civil actions. This may involve

¹ *Ante*, pp. 220-1.

² This list is taken also to include the local courts of special jurisdiction. It excludes, however, the coroners' courts, which are difficult to classify.

primarily the decision of points of law, the ascertainment of facts, or the exercise of a discretion, or any of them. For instance, a county court or a court of summary jurisdiction may have no function in respect of a debt admitted to be due except to consider whether an order for payment by instalments shall be made.

(b) The trial of criminal prosecutions. Where (as in the vast majority of cases in the courts of summary jurisdiction) the accused pleads guilty, the only function of the court is to determine whether a punishment shall be inflicted, and, if so, what punishment.

(c) The hearing of appeals from lower courts and from administrative tribunals or authorities. Sometimes (as in appeals by case stated from courts of summary jurisdiction and the general or special Commissioners of Income Tax) the appeal is on a point of law only; sometimes the facts are taken to be found by the lower body, but the law or the order (which may involve the exercise of a discretion) is questioned; sometimes any part or the whole of the process may be challenged.

(d) The making of decrees of nullity or divorce, judicial separation, maintenance orders, bastardy orders, adoption orders, etc., and the granting of consent to marry. These functions are extremely varied in their character.

(e) The administration of the estates of deceased persons, the dissolution of partnerships and the taking of partnership and other accounts, the redemption or foreclosure of mortgages, the raising of charges on land, the sale and distribution of the proceeds of property subject to any lien or charge, the execution of charitable or private trusts, the appointment of new trustees, the rectification or cancellation of deeds and other written documents, the partition or sale of real estates, the wardship of infants and the care of infants' estates, the winding up of companies, the variation in the rights of shareholders, etc.

(f) The licensing of premises for the sale of alcoholic liquor, the extension of hours of sale, the licensing of billiard rooms.

(g) The issue of warrants of arrest, the granting of bail, the issue of orders to find sureties to keep the peace or for good behaviour.

(h) The making of orders for the restitution of goods stolen, or unlawfully detained, or unlawfully pawned, or unlawfully distrained, or fraudulently removed to avoid payment of rent, and of orders with respect to goods in the possession of the police.

(i) The making of orders for the abatement of nuisances, closing polluted wells, prohibiting the use of unfit houses, closing overcrowded houses, the destruction of unsound meat, the removal of persons suffering from infectious disease, and the removal of dead bodies.

It is fairly obvious at a glance that there is no element common to all these functions which enables analysis to obtain a material concept of the separation of powers. It will be wise, however, to consider the arguments which have been used to show the existence of such a concept. For the moment we are not concerned with the judicial class of functions in itself, but with the functions actually exercised by the British courts; but, of course, the arguments have been used to show that there is a separate class of judicial functions, whether or not they are exercised by courts. The arguments used seem to be three in number.

(i) *A judicial function involves a dispute between two or more parties.*¹

This is true of many of the functions of the courts, but it is by no means true of all. As far as possible the courts

¹ "A true judicial decision presupposes an existing dispute between two or more parties": Report of the Committee on Ministers' Powers, p. 73. See Bonnard, *op. cit.*, p. 21, to the same effect.

are anxious to use the method or *procedure* of deciding between contesting theses. Consequently, when an information is laid before a justice of the peace, he may bind over the informer to prosecute; and if the accused does not plead guilty, the dispute is one between the prosecutor on behalf of the King and the accused. Here the *procedure* of the dispute is followed, even when the prosecutor would prefer not to continue. There is, however, no dispute when the accused pleads guilty. This is most obvious when a person is indicted for murder. The procedure is then purely formal, and the court must sentence the accused to the death penalty. It is equally the case, however, where the court has a discretion as to the punishment. The prosecutor has no concern with the punishment, and the court's function is to listen to the agreed facts, to hear the accused's plea in mitigation, and to determine what punishment, if any, shall be imposed. Much the same argument applies to many cases where action is taken on debts and the like, and the defendant submits to judgment. In cases of charitable trusts, again, there may be no dispute, but the Attorney-General is served in order that a defendant may be provided and the interests of the public put before the court. There is no dispute, again, in an undefended divorce or nullity petition, nor in much of the jurisdiction of the Chancery Division of the High Court, such as the investment of trust funds, the appointment of new trustees, the winding up of companies, and so on. Many other examples could be drawn from the work of the courts of summary jurisdiction. It may be urged in some of these cases that the function is conferred upon the courts because there may be a dispute, and until the matter is before the court it is not known whether or not there will be. This would be a modification of the argument (and in point of fact there is always the possibility of a dispute, no matter by whom the function is exercised—but let that pass for the

present); but in fact the function of dealing with undefended divorce cases, for instance, is conferred upon judges merely because it is considered necessary to have an investigation and that the judges are the most competent people to deal with it. In other words, the function is given to judges because of their character and their procedure—a formal distinction.

(ii) *A judicial function involves no exercise of discretion.*¹

It is hardly necessary to do more than to state this argument, since the list of functions already given shows that it has no foundation if it is intended to describe the functions of the courts. There is, no doubt, an emphasis in many cases upon the interpretation of the law and the ascertainment of the facts. In most cases, however, the problem is one of discretion. In nearly all criminal cases the most difficult part of the jurisdiction is to determine what punishment, if any, shall be inflicted; and, except in the few "capital" cases, there is always a discretion. There is frequently a discretion in civil cases, as to the remedy to be given or the amount of damages when it is decided that damages is the remedy. The existence of discretion in the divorce courts is so well known that there are even principles of policy as to the way in which it should be exercised. The prerogative writs (except habeas corpus), injunctions, specific performance, and other equitable remedies are all termed "discretionary." In respect of most of the orders made and in respect of all the licences

¹ This seems to be implied in the fourth "requisite" of a true judicial decision according to the Report on Ministers' Powers, p. 73: "A decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land upon the facts so found, including where required a ruling upon any disputed question of law." Since nearly every case in the courts requires the exercise of discretion as well, it seems that the courts exercise few true judicial functions.

granted by courts of summary jurisdiction there is a discretion.

(iii) *A judicial function is exercised at the request of a person interested.*¹

This is true of nearly all the functions of the State, especially if it be admitted that some Governmental institution may be the person interested. Even judges themselves may initiate the exercise of the function; thus a High Court judge may commit a person for contempt of court; and "person interested" must be understood in rather a peculiar sense in relation to criminal offences, since a justice of the peace may issue a summons on any information, and a warrant for arrest if the summons is not obeyed.² In many other cases the "interested person" is an officer of the court, as in the case of most maintenance orders.

(3) *Administrative Authorities*

Among administrative authorities may be included all Governmental agencies which have not been included in Parliament or in the courts. It is quite impossible to detail the functions of these bodies, but the most important may be placed in the following categories:

(a) Decisions of pure policy. These include Cabinet and ministerial decisions, such as those relating to external affairs, which do not immediately interfere with private rights. Such a decision may be precedent to legislation or to an administrative decision which interferes with private rights.

(b) Inspections. These include the inspection of factories, coal mines, and dwelling houses. The purpose is

¹ Bonnard, *op. cit.*, p. 21.

² In fact, it appears that a justice of the peace can arrest for felony like a constable.

to determine whether any other administrative action shall be taken or whether proceedings shall be taken in a court.¹

(c) *Inquiries.* These are often ancillary to the exercise of other powers, such as applications for orders or appeals against decisions of administrative authorities. There is, however, a general power to set up tribunals of inquiry, as well as a special power in connection with railway accidents.²

(d) *Pardon and the remission of penalties.*

(e) *The issue of licences, for instance, for the practice of vivisection, for the driving of motor vehicles, for the use of public service vehicles, etc.*⁴

(f) *The making of rules, orders, regulations, and byelaws.* These may be as general as any Act of Parliament⁵ or they may be individual orders. They may even impose taxation⁶ or amend Acts of Parliament,⁷ or authorise the compulsory acquisition of land. Sometimes they have to be specifically approved by Parliament; sometimes they have to be laid before Parliament and may be annulled on address from either House; and sometimes they are not laid before Parliament at all.

(g) *The making of schemes.* A scheme such as a town and country planning scheme or improvement or re-development scheme under the Housing Acts applies over a limited area. In part it lays down general regulations

¹ Cf. Report on Ministers' Powers, p. 20.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.* Under s. 5 of the Cinematograph Act, 1909, a county council may delegate to *justices of the peace* its power to issue cinematograph licences.

⁵ Cf. the Defence of the Realm Regulations; Regulations under the Emergency Powers Act, 1920.

⁶ Cf. Report on Ministers' Powers, pp. 11, 31-6.

⁷ *Ibid.*, pp. 36-8.

for that area, in part it divides the area into zones and applies special rules to each, and in part it places restrictions upon specified persons or specified plots of land. It is, in other words, a composite method of dealing with matters which otherwise would have to be covered by regulations and orders.

(h) The taking of individual decisions affecting private rights. Usually this involves the exercise of a discretion, though sometimes it does not. For instance, if a policeman has power of arrest he may abstain from arresting; but if he has no such power and therefore obtains a warrant from a justice of the peace, he must arrest if he can. Again, an insurance officer has no discretion to refuse unemployment insurance benefit to a person who satisfies the statutory conditions. Sometimes, as in most cases under local government law, the individual affected has a right of appeal to a higher administrative authority, or to a special administrative tribunal (such as a court of referees in insurance cases), or to a court.

(i) The hearing of appeals from other administrative authorities. The word "appeal" is here used in rather a wide sense, since it is impossible to distinguish (except in terms of procedure) cases in which (i) the decision needs confirmation and any person may object to the confirmation,¹ (ii) the decision stands unless an objection or appeal be lodged,² and (iii) the decision may be the subject of a complaint.³ It is often a mere accident of history whether an appeal lies to a court or to an administrative authority.

¹ E.g. the draft valuation list for rating is confirmed by the assessment committee, but any ratepayer can object either then or at any other time.

² E.g. the decision of an inspector of taxes stands unless the taxpayer appeals to General or Special Commissioners of Income Tax.

³ E.g. under the Public Health Acts a person aggrieved may usually make a complaint to the Minister of Health.

For instance, if a local authority desires to secure the demolition of two houses which it considers to be unfit for human habitation, it makes a clearance order which requires to be confirmed by the Minister of Health after a local inquiry. If, however, only one house be sought to be demolished, a demolition order may be made, and the person concerned may then appeal to a county court. Until 1930 the appeal in this latter case lay to the Minister, but the jurisdiction was then transferred to the county court, not because the function was alleged to be "judicial," but because the old procedure involved the expense and delay of a local inquiry. Usually the administrative authority has a certain discretion; but there are cases where the sole function is to ascertain the facts and apply the law. For instance, appeals from decisions of insurance officers go to courts of referees, and no discretion whatever is exercised by either. Appeals on points of law go from the courts of referees to the Umpire.

Nobody has seriously sought to define an "administrative function" except by a process of exclusion. It is obvious from the above list not only that the kinds of functions are extremely diverse, but also that many of them have exact parallels in the functions exercised by courts. It is quite impossible to draw a distinction between "judicial" and "administrative" functions in terms of the nature or substance of the functions actually exercised by the courts and the administrative authorities in this country. The most that can be said is that the courts are much more concerned with questions of law, and the administrative authorities with questions of discretion. Nor is it possible to draw a precise distinction between the functions of Parliament and of the administrative authorities, subject always to the rule that Parliament can by legislation do what it pleases, and that most of the powers of administrative authorities (like the powers of the courts) derive from legislation.

III

The above analysis might lead to the conclusion not that a separation of powers is not possible, but only that the principle is not carried out in Great Britain. As the Committee on Ministers' Powers said in a marginal note summarising the substance of a paragraph,¹ "decisions may be truly judicial though not given by a court of law." The Committee was, therefore, quite certain that there was a clear distinction between them. On the other hand, it was not so certain that there was a clear division between legislative and administrative functions: "It is indeed difficult in theory and impossible in practice to draw a precise dividing line between the legislative on the one hand and the purely administrative on the other; administrative action so often partakes of both legislative and executive characteristics."²

In fact, however, it is easier to draft a definition of a legislative function than of a judicial function. It may be said that legislation is the making of general rules of law. It is true that there is here no "precise dividing line" because generality is always a matter of degree. Nevertheless, it gives a working definition which might possibly be used by a draftsman. It would not satisfy British practice: for with us legislation is either the substance of what is enacted by Parliament or the process of enacting that substance. Parliament legislates when it enacts; and what it enacts is legislation. Nor, in truth, does the definition assist the draftsman very much. There is no despotism or tyranny where a Government Department makes general regulations under Parliamentary authority, though there might be if all laws were so made. The practice of delegating "legislative" power is one of respectable antiquity and, subject to limitations, it has been approved by the Committee

¹ Report, p. 74.

² *Ibid.*, p. 19.

on Ministers' Powers, though it was considered that certain safeguards should always be provided, and that certain kinds of delegation should be used only in exceptional circumstances. In other words, the doctrine of the separation of powers does not enable a clear distinction to be drawn as a matter of analysis, and in any case does not assist in determining what functions should be exercised by Parliament and what by the administrative authorities.

What is more, the courts themselves make general rules. Possibly we may treat the Rule Committee of the Supreme Court, which regulates legal procedure subject to Acts of Parliament and by their authority, as an administrative authority, though it consists mainly of judges. But the rules of common law and equity have themselves been made by the judges, who are aware that, by taking a decision on a point of law, they are creating a precedent for future use and a rule for future action. This function is exercised too, in the interpretation of statutes. The law governing the matters in section 4 of the Statute of Frauds, 1677, is not contained in the Act, but in the decisions of judges for the past 250 years. The English rule of precedent deliberately confers a law-making function on the judges; but the process operates even where there is no such rule. The distribution of legislative powers in Canada depends not only on the British North America Act, 1867, but also on the numerous decisions of the Judicial Committee of the Privy Council, which is not bound by its own decisions (and which has in fact, though not definitely overruling itself, decided according to different principles from time to time ¹). In any case, the same function is exercised even where the English tradition does not apply. The law relating to judicial proceedings against French administra-

¹ See Jennings, "Constitutional Interpretation—The Experience of Canada," *Harvard Law Review*, Vol. LI, p. 1.

tive authorities has been developed by the decisions of the *Conseil d'État*, and the rules of the French Civil Code have been profoundly modified by decisions of the civil courts.

The Committee on Ministers' Powers was much more certain that it was possible to define a judicial function, and in fact produced a definition:

A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites:

(1) the presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law.¹

It has been shown already that some functions of the courts do not relate to existing disputes.² In most cases, if not in all, there is a potential dispute; but this is equally true of those functions of administrative authorities which affect the interests of private persons or of other public authorities. The possibility is clear enough where an authority has power directly to interfere with private interests, as by assessing to taxation, or ordering the destruction of property, or refusing consent to building plans. It arises in other cases, however. For instance, friendly societies and contributors may be disputants where the Minister of Health makes rules under the National Health Insurance Act; there is a dispute where the Home Secretary

¹ Report, p. 73.

² *Ante*, pp. 267-9.

refuses to confirm a local authority's byelaw; and there is again a dispute where the Home Secretary refuses to give a licence for the practice of vivisection. Nevertheless, accepting the Committee's contention, for the purposes of its own definition, that a judicial function involves a present dispute, it is necessary to go further and to indicate what kinds of disputes. When the Committee's four "requisites" are examined, it will be found that the first three, and in part the fourth, relate not to the substance or quality of the function, but to the procedure which is used to exercise it. The fourth "requisite" does suggest that there must be no discretion; but if this is so, most of the functions of the courts are not judicial at all.¹ In other respects, the fourth "requisite" is based on procedure, for the nature or quality of the function is not altered by the fact that some authority can overrule a decision. If the functions of a criminal court are judicial, they remain judicial in spite of the power of the Crown to issue a free pardon or of the House of Lords, after a certificate from the Attorney-General, to reverse the decision on appeal.

Thus the definition is based almost entirely on procedure. If a decision is given in a certain way, it is judicial; if therefore a function is exercised in a particular way, it is judicial. The definition is based on a formal theory of the separation of powers, and gives no assistance in determining the question what functions should be exercised by what authorities. The Committee's purpose in framing the definition was to determine the principles on which functions should be allocated between ministers and courts. The draftsman of a Bill should be able to turn to the Report so as to be able to confer the function on the proper authority; and if he allocated it wrongly, members of Parliament should be able to amend the Bill accordingly.

¹ *Ante*, pp. 269-70.

The definition does not allow this to be done; it says simply that if a function is given to a court to be exercised in a certain way it ought to be exercised by that court; or, if a function is given to an administrative authority to be exercised in exactly the same way, it ought to be transferred to a court. Thus a court of referees hearing an appeal by an insured person against an insurance officer exercises a judicial function because it exercises it in a judicial manner¹; but if it exercised it in another manner the function, though the same, would be different. The definition gives the draftsman no assistance whatever, except that he ought not to prescribe a judicial procedure for an administrative body.

This is shown by the one instance in which Parliament has tried to apply the definition. The Restriction of Ribbon Development Act, 1935, imposes, or enables the highway authorities to impose, restrictions on the development of frontages on certain roads. Where such restrictions exist, development is forbidden without the consent of the highway authority. Here, then, is a potential dispute, which becomes an actual dispute when the developer objects, which he usually does. It was thought that there should be a right of appeal from the decision of the highway authority. The appellate body would have to ascertain the facts and determine points of law,² though its primary function was to determine whether the consent was "unreasonably withheld" or "made subject to unreasonable conditions."³ The Bill as drafted conferred this function

¹ See Report, p. 87.

² It has in fact done so; see Restriction of Ribbon Development Act: Review of Decisions given by the Minister of Transport up to June 30th, 1937, p. 10, and the cases there quoted.

³ It is arguable that this too is a matter of law. If the function were exercised by a superior court, there would soon arise a body of precedents to determine what was "reasonable," and in any case the

on the Minister of Transport. The Standing Committee of the House of Commons decided that the function was "judicial" and conferred it upon the courts of summary jurisdiction. On the insistence of the Minister of Transport, the House of Commons again amended the Bill and restored the jurisdiction to the Minister. Sir Leslie Scott, who had been Chairman of the Committee on Ministers' Powers, stated that the function was not judicial. The fact is that (assuming, as we must, that the courts exercise a judicial function even when they have a discretion, as they usually have) the function would have been judicial if it had been vested in the courts and administrative or "quasi-judicial" if it had been vested in the Minister.

Sir Leslie Scott, by this time Scott L.J., again tried to apply his Committee's definition in *Cooper v. Wilson*.¹ There a police sergeant was charged by the Chief Constable with certain offences against discipline, and the Chief Constable purported to dismiss him. The sergeant appealed to the Watch Committee of the borough council. It was decided by the Court of Appeal that he had already resigned; but incidentally the question was raised whether the decision of the Watch Committee was valid in view of the fact that the Chief Constable had been present at its deliberations. Obviously the function of the Watch Committee was strictly analogous to that of a court of quarter sessions. A charge of breach of discipline is analogous to a charge of crime, and the Chief Constable purported to inflict the punishment of dismissal, though he

question is one of the interpretation of the statute in terms of the ascertained facts. The decisions are reported (see previous note), but, being decisions of a minister, they are not binding. They would not be binding, however, if they were decisions of courts of summary jurisdiction. It may be doubted whether there is a distinction between "law" and "fact"; but it need not be discussed here.

¹ [1937] 2 K.B. 309.

might have reduced the sergeant's rank or merely reprimanded him. On the other hand, his procedure was quite different, and no one would suggest that the power of dismissal should be vested in a court. The function of the Watch Committee was to determine the appeal, and the question at issue was whether it ought not to have followed the practice of the courts (and the law governing inferior courts) by excluding the Chief Constable as a party to the appeal. Scott L.J. quoted the definition of the Committee on Ministers' Powers, and came to the conclusion that the function was quasi-judicial but approached "in point of degree very near the judicial." In other words, his definition made the function administrative or quasi-judicial; but the jurisdiction was so like that of a court that he wanted to make it judicial. Yet if the function had been exercised by a court it would not have been judicial, because the court would have had a discretion to convert the dismissal into a reduction of rank or a reprimand. In any case, it will be seen that the definition gave no assistance whatever.

Appeals from lower administrative authorities are necessarily in a special category. Here there is not merely a dispute, but a dispute in which the appellate authority is not a party. The function of hearing appeals is therefore similar to many (though by no means all) of the functions of courts. In fact, the change from an administrative authority to a court or vice versa is often made without changing the essential nature of the function, because it is desired to have a more competent, or a less competent but more impartial, tribunal, or because it is desired to have one kind of procedure rather than another. Sometimes, too, an appeal goes from one administrative authority to another, and from that other to a court. Thus rating objections are heard by assessment committees (the objection taking the form of, and being called in practice, an

appeal), and thence to a court of quarter sessions. Appeals on income tax cases go to Commissioners, and thence (though on a point of law only) to the High Court. Appeals from the Railway Assessment Authority go to the Railway and Canal Commission, and thence to the House of Lords. If the function of hearing appeals is called "judicial," no harm is done; but it must be remembered that under such a definition many of the functions of the courts are not judicial.

Also, the use of the definition does not imply that the appellate body ought to be a court. The Committee on Ministers' Powers, while not recognising that it was dealing with appellate functions (which it clearly had in mind) recognised that this may be so.¹ The question in each case is not whether the function is appellate or "judicial" or not, but whether it can be dealt with more conveniently by a judge and by one of the techniques which judges normally use, or whether it should be dealt with by an administrator and by one of the techniques which an administrator normally uses. Accordingly the allocation of the function depends upon a considerable number of factors, of which the more important are set out below.

(a) If the question raised is likely to be primarily a matter of interpretation or of common law, a judge may be more appropriate than an administrator; though if the branch of law is highly specialised and requires a knowledge of the administrative technique and problems (as is the case with most branches of administrative law) it may be more convenient to give it to an administrative tribunal or to an administrator.

(b) If it is feared that an administrator may be biased, either because he has some interest in the exercise of the function, or because he may be more concerned with the

¹ Report, pp. 92 *et seq.*

general interests of the public than with the special interests of the private person (and it is considered, as it usually is, that some kind of balance between the interests must be reached) it may be more convenient to give the function to a judge, not only because he is given an independent status and is more accustomed to trying to be impartial, but also because the judge (normally) sits and hears oral evidence in public. The same result may be achieved by setting up an administrative tribunal, though people generally have more confidence in professional judges than in special tribunals.¹

(c) If the function is otherwise suitable for a court, but the procedure is so expensive and dilatory that the right of appeal would not in fact be of value, it may be more convenient to give the jurisdiction to an administrative tribunal or to an administrator. As a distinguished judge once said: "The courts are open to everybody, like the Ritz Hotel"; but it does not follow that the House of Lords is a suitable tribunal for an unemployed person who claims insurance benefit or for an aged person who claims an old age pension.

(d) If the method of ascertaining facts by oral evidence in open court is not convenient, the function may be given to an administrator. Normally a judge can determine whether a house is insanitary only on the basis of expert evidence. Such evidence is usually conflicting; and it may therefore be convenient to give the function to an administrator who is advised by an impartial expert. The same result could, however, be achieved by the use of technical assessors, a practice which is followed only in Admiralty cases.

¹ Considerations (a) and (b) and others yet to be mentioned raise the question of the desirability of the creation of general administrative tribunals, having the same status as the civil courts.

(e) If the discretion to be exercised in giving the decision is the really important part of the function, and if that discretion ought to be exercised on the basis of some long-term policy, it is generally desirable to give the function to an administrator. Other factors may prevent this from being done. For instance, it is very desirable to establish a long-term policy in respect of punishment for offences, and it can hardly be contended that the courts of quarter sessions or the Court of Criminal Appeal are the appropriate bodies for the purpose. On the other hand, it would not be suggested that the administration of the criminal law, even in respect of appeals, should be exercised by administrators. A compromise is effected in some cases by giving the Prison Commissioners considerable discretion, and through the prerogative of pardon.

This list is not exhaustive, but it does indicate that, even in respect of appeals, no firm line can be drawn between functions which ought to be exercised by courts and those which ought to be exercised by administrative tribunals and administrators. It is indeed clear not only that no distinction can be drawn between functions by reason of their substance or quality, but even that it is not easy to make a formal distinction in respect of procedure. The doctrine of the separation of powers gives no assistance in the allocation of functions. Nevertheless, it must be repeated that these arguments do not tend to show that functions should be placed under any unified control other than that of ultimate policy vested in the representative legislature. The need for independent judges is sufficiently obvious from what has been said; and though it is not possible to determine precisely what functions should be exercised by Parliament and what by administrators, it is clear that, so long as the major principles of policy are determined by Parliament, the application of those principles to current

problems can be left to administrators. The safeguard against bureaucracy or tyranny lies not in a precise delimitation of functions, but in democratic control through an elected House of Commons in which the Party system makes criticism open and effective.

DICEY'S THEORY OF THE RULE OF LAW

THE various aspects of the "Rule of Law" as elaborated by Dicey¹ have been discussed at the appropriate points in the body of this book.² But the theory obtained such general support among constitutional lawyers and others that it is desirable to examine all its implications together.

"That 'rule of law' which forms a fundamental principle of the Constitution," says Dicey,³ "has three meanings, or may be regarded from three different points of view.

"It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the Government. Englishmen are ruled by the law, and by the law alone; a man may, with us, be punished for a breach of the law, but he can be punished for nothing else.

"It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the 'administrative law' (*droit administratif*) or the 'administrative tribunals' (*tribunaux administratifs*) of France. The notion which lies at the bottom of the 'ad-

¹ *Law of the Constitution* (8th ed.), Ch. IV.

² *Ante*, pp. 38-40, 53-61, 210-18.

³ *Op. cit.*, pp. 198-9.

ministrative law ' known to foreign countries is that affairs or disputes in which the Government or its servants are concerned are beyond the sphere of the civil courts and must be dealt with by special and more or less official bodies. The idea is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs.

" The ' rule of law,' lastly, may be used as a formula for expressing the fact that with us the law of the Constitution, the rules which in foreign countries naturally form part of the constitutional code, are not the sources, but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have, with us, been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the Constitution is the result of the ordinary law of the land."

(1) SUPREMACY OF THE LAW

THE difficulty of the first of these meanings lies in the distinction between " regular law " and " arbitrary power." The word " arbitrary " has acquired a sinister connotation; it implies not merely a power which may be exercised or not at the will of the possessor, but a power which is likely to be abused. All powers can be abused, whether they are derived from " regular law " or not. It cannot be doubted that some of the governmental powers in England are sometimes abused. For example, the power of the Commissioners of Inland Revenue to appeal against a decision of Special or General Commissioners of Income Tax to the High Court and thence to the Court of Appeal and the House of Lords is sometimes abused (though, naturally, in the interests of the revenue). The legal process is so expensive that no ordinary taxpayer can resist a

threat to "take the case to the Lords," and to demand costs if appeal is ultimately successful. Similarly, some will say that the courts have abused their power of committal for contempt by making newspaper criticism of a judge almost impossible; and it is certain that the House of Commons has on occasions abused its similar power.

Dicey does not mean that powers ought not to be abused; what he really has in his mind is that wide administrative or "executive" powers are likely to be abused, and therefore ought not to be conferred. But, as between "regular law" and "administrative powers" there is no opposition. All powers are derived from the law, whether they are the enormous powers of the late eighteenth century, the comparatively limited powers of the middle of the nineteenth century, or the rapidly expanding powers of the present century. Indeed, if the Stuart kings had substantiated their claims to legislate and tax without the consent of Parliament and to suspend and dispense with laws, these powers would still be recognised by "regular law." The extent to which public authorities have wide powers depends, of course, upon prevalent notions as expressed in the law. During the period between the first and second Reform Acts (1832-67) Cobdenite ideas prevailed in England, and attempts were made to free trade and industry of as much regulation as possible, though there was an increase of powers of local government at the same time. The reaction is not clear and definite until the third Reform Act (1884), and though Dicey was writing his book at about that time, the Whig section of the Liberal Party, to which Dicey belonged, was still fighting what appeared to be a successful defensive action. Dicey¹ here, and even more

¹ See *Law of the Constitution* (8th ed.), Introduction; *Law and Opinion in England* (2nd ed.), Introduction.

obviously in his later writings,¹ was stating as a principle of the British Constitution what he, and many others of his generation, thought *ought to be* a principle of policy. It is a principle of political action, not a purely juridical principle governing the actual distribution of powers. The support by the Committee on Ministers' Powers¹ of the same principle is based on essentially the same grounds. The "rule of law" in this sense means that public authorities ought not to have wide powers; that is, that the "collectivism" which has infused the policies of all Governments since Disraeli's is an undesirable principle. The "rule of law" in this sense is a rule of action for Whigs and may be ignored by others.

A constitution does, of course, embody the political ideas of its framers. A constitution like that of Great Britain, not made all at once, but only bit by bit, must embody the political ideas of successive generations of legislators, administrators, and judges. A house which has been built in sections by successive occupiers since the reign of Queen Elizabeth may contain relics of Georgian neo-classicism. Two relics of older ideas in the British Constitution combined to give the "rule of law" in this aspect an element of plausibility.

In the first place, the victory of Parliament over the Stuarts, the enactment of the Bill of Rights, and the acceptance by the judges of the ideas of the Whig Settlement, entirely deprived the Crown of internal legislative powers. The Government in England has not possessed since 1689 any general power of issuing decrees (*règlements* in the sense of continental law) in execution of legislation. Consequently, powers of issuing regulations and orders are given separately in relation to each function of government. Though there were many such powers in existence when

¹ Cmd. 4060 (1932), p. 71.

Dicey wrote,¹ they have become much more noticeable of recent years. Thus the fact that Chief Justice Coke objected to the enforcement of proclamations by the Star Chamber, and that Calvinist and Protestant Parliaments objected to the use by Arminian and Catholic monarchs of dispensing and suspending powers, has resulted in a close judicial control of ministerial regulations and orders.

In the second place, most functions of administration in eighteenth-century England were performed by judges and justices of the peace. Professionally, therefore, lawyers were likely to regard with doubt and even aversion the creation of new authorities to whom vast new functions were accorded. The statutes conferring these powers were strictly construed, and the prerogative writs were extended in order to effect what the lawyers regarded as necessary judicial control. Nor were the lawyers alone in their suspicion. The Tories objected strongly to the reforms of 1834 and 1835. Young Disraeli found that the new Toryism obtained substantial popular support when it was put as an attack on the new poor law and on the growing powers in respect of public health. The Municipal Corporations Act, 1835, was, in a legal sense, an attack on property, for corporative rights were "property"; and in any case the major purpose of the reform was to substitute Whigs and dissenters for Tories and Churchmen. These reforms having been effected, the Whigs were by no means anxious to extend them. The manufacturers who formed the backbone of the Whig Party wanted nothing which interfered with profits, even if profits involved child labour, wholesale factory accidents, the pollution of rivers, of the air, and of the water supply, jerry-built houses, low wages, and other incidents of nineteenth-century industrialism

¹ E.g. under the Poor Law Amendment Act, 1834, and the Public Health Act, 1875.

In the field of central government they secured the removal of restrictions, and they were not anxious for restrictions under the control of local authorities. No Whig politician made a reputation as a social reformer. The incentive came from Tory philanthropists like Lord Shaftesbury and administrators like Sir Edwin Chadwick. Since both Parties were against them, these efforts would have been quite ineffective but for the periodical visitations of infectious diseases; indeed, until 1875 the development of public health law may be related almost exactly to cholera epidemics. These epidemics did, therefore, produce new administrative powers, but very slowly; and the questions raised were not "politics" of the kind with which any important statesman was likely to soil his fingers. To a constitutional lawyer of 1870, or even 1880, it might have seemed that the British Constitution was essentially based on an individualist rule of law, and that the British State was the *Rechtsstaat* of individualist political and legal theory. The Constitution frowned on "discretionary" powers, unless they were exercised by judges. When Dicey said that "Englishmen are ruled by the law, and by the law alone" he meant that "Englishmen are ruled by judges, and by judges alone." That would have been an exaggeration, but it was good individualism.

In truth, Dicey was not thinking of these new powers. There is no evidence that he knew much about them, and in any case he paid little attention to them. The whole of his book assumes that the constitutional lawyer is concerned with "politics." Social reform was not politics, except for radicals, until about 1890, when the ideas brought into the Unionist Party by Mr. Joseph Chamberlain joined with the vague paternalism which (with imperialism) was Lord Beaconsfield's legacy to the Conservatives. Dicey lived and died a Whig, and he was much more concerned with the constitutional relations between

Great Britain and Ireland than with the relations between poverty and disease on the one hand, and the new industrial system on the other. In internal politics, therefore, he was concerned not with the clearing up of the nasty industrial sections of the towns, but with the liberty of the subject. In terms of powers, he was concerned with police powers, and not with other administrative powers. The police have not been given "wide discretionary authority," and the *Polizeistaat* of German legal theory has never been established in England. This is, however, one aspect only of the liberal-democratic "rule of law," whose nature has been discussed in the body of the book.¹

If, then, the rule of law means only that powers must be derived from the law, all civilised States possess it. If it means the general principles of democratic government, it is unnecessary to mention it separately. If it means that the State exercises only the functions of carrying out external relations and maintaining order, it is not true. If it means that the State ought to exercise these functions only, it is a rule of policy for Whigs (if there are any left).

(2) EQUALITY BEFORE THE LAW

"EQUALITY before the law," says Dicey, is the second aspect of the rule of law. By "equality," of course, he does not mean equality. For "equality before the law" in its most obvious sense means an equality of rights and duties. In this sense there is no equality. Pawnbrokers, money-lenders, landlords, drivers of motor-cars, infants, married women, and indeed most other classes, have special rights and duties. Nor is it possible to affirm that equality exists because any person can legally join one of these classes. A man cannot become a married woman or an infant; nor can anyone become a licensee of a public-house

or a film exhibitor without the consent of someone else.

What Dicey suggests by equality is that an official is subject to the same rules as an ordinary citizen. But even this is not true. An official known as a collector of taxes has rights which an ordinary person does not possess. A sanitary inspector can enter my house to inspect my drains, though my employer cannot. The Home Secretary can compel me to make up a census return, though my neighbour cannot. A sheriff can summon me to serve on a jury, though my friends cannot. The list could be expanded almost *ad infinitum*. All public officials, and especially public authorities, have powers and therefore rights which are not possessed by other persons. Similarly, they may have special duties. I cannot be compelled to maintain any person who is not a member of my family; a poor law authority is under a statutory duty to relieve every poor person within its area, and a relieving officer to take the necessary steps to that end. An elementary education authority must provide free elementary education for all children between certain ages. The Minister of Labour is under a duty to provide unemployment insurance benefit out of funds vested in him for that purpose. Again a long list of examples could be drawn up.

It is clear, therefore, that by "equality before the law" and "obedience to the law" Dicey was not referring to that part of the law which gives powers to and imposes duties upon public authorities. What he was considering—and subsequent chapters make this clear—was that if a public officer commits a tort he will be liable for it in the ordinary civil courts. I have explained that normally, and subject to qualifications, this is true.¹ But it is a small point upon which to base a doctrine called by the magni-

¹ See *ante*, pp. 199-207.

ficient name of "rule of law," particularly when it is generally used in a very different sense. Nor does this make any effective contrast with *droit administratif*. For the purpose of *droit administratif*, as I have indicated in Ch. VI, is not to exclude public officers from liability for wrongful acts, but to determine the powers and duties of public authorities and to prevent them from exceeding or abusing their powers. For this administrative courts are not in the least necessary, though both English and continental experience suggests that it can be done more easily by such courts. The fact that France has and England has not an effective system for controlling administrative authorities is a strange reason for suggesting that England knows no administrative law but has a "rule of law" instead. Moreover, administrative courts are as "ordinary" as the civil courts. There is no more reason for calling them extraordinary than there is for calling the criminal courts extraordinary. Also, they are just as much official as the civil courts, and no more. All courts are official. What matters is their independence of administrative influence and control. A judicial system in which the Lord Chancellor, an administrative officer, has such considerable authority can hardly be said to be less "official" than the French administrative system. In any case, I repeat, administrative courts are not essential to *droit administratif* in the French or any other sense.

(3) THE RESULT OF THE ORDINARY LAW

LASTLY, "the Constitution is the result of the ordinary law of the land," says Dicey. It is equally true that the law of the land is the result of the Constitution. The fundamental principle of the law is the power of Parliament, which came by a political movement and which was then recognised as law. In this sense the law determines the

Constitution, though the Constitution determines the law. Law and constitution cannot be separated. "The rules which in foreign countries naturally form part of a constitutional code" mostly do not exist in England, for the recognised (or legal) supremacy of Parliament prevents any fundamental distribution of powers and forbids the existence of fundamental rights. The supremacy of Parliament is the Constitution. It is recognised as fundamental law just as a written constitution is recognised as fundamental law. Various public authorities—the Crown, the Houses of Parliament, the courts, the administrative authorities—have powers and duties. Most of them are determined by statute. Some are traditional, and so are "determined" by the common law. The powers of administrative authorities in respect of "fundamental liberties" are mainly contained in statutes. But even if they were not, I do not understand how it is correct to say that the rules are the consequence of the rights of individuals and not their source. The powers of the Crown and of other administrative authorities are limited by the rights of individuals; or the rights of individuals are limited by the powers of the administration. Both statements are correct; and both powers and rights come from the law—from the rules.

In any case, these particular rules are but a small part of the Constitution. The administrative authorities have hosts of other functions besides interfering with "fundamental liberties." The truth is that Dicey was again emphasising the individualistic theories of the nineteenth-century Whigs. Law, for them, consisted of rules limiting the freedom of action of individuals. Constitutional law, therefore, contained the rules which protected the individual from too great interference by police officers. They disliked, and therefore tended to ignore, the new administrative powers which the Industrial Revolution made necessary. Just as the Tories of the eighteenth century assumed

that the Constitution was built up on the landed interest, so the Whigs of the nineteenth century assumed that the Constitution was built up on free or unrestricted competition. The function of the State, on this view, was to "keep the ring" so that peace could be maintained for foreign trade and order maintained for industry and internal trade. In the process, however, free competition spoiled the face of a large part of England and did much damage to the stock from which its people were drawn. Many Tories, like Disraeli, saw no great gains from this new system; and when the better-paid workers obtained the vote, it needed only someone like Mr. Joseph Chamberlain to organise it for creating new powers of control. After 1886 neither Party was individualist. The Unionist Governments of 1886-1905 added vast new powers to those possessed by local authorities. The Liberal Governments of 1905-14 created new authorities and conferred upon them new functions. Between 1914 and 1918 new instruments and functions were established in order to organise the whole force of the nation for the purposes of war. Since 1919, not only has the State intervened to protect the individual from the consequences of industrialism, but also the development of foreign competition has induced Governments, especially Conservative Governments, to create institutions and powers for the purpose of assisting and rationalising industry, commerce, and agriculture. Farmers and manufacturers alike ask Parliament not to free them from discretionary powers, but to confer more discretionary powers in order that they may be further assisted. The only difference between Government and Opposition is whether individual powers ought to be powers of administration or powers of control, whether the State itself should provide services, or whether they should be provided by private enterprise under State control. The notion of the functions of the

State has changed, and the balance of the Constitution with it.

In the political sphere there is much in the Whig philosophy with which any democrat will agree, and which is, therefore, an accepted and, one might almost say, permanent part of the Constitution. The principles of 1689 have become part of the accepted theory of democracy. If ultimate power is to be vested anywhere, it must be in a representative assembly. If an army is established, it must be under the control of the assembly. Judges must be independent and yet exercise essentially subordinate functions. The "rights" of free speech, assembly, and association must be wide enough to allow the citizen to exercise his democratic functions; and this means essentially the right to advocate any policy except that of subverting the Constitution by force or creating disorder. These are political principles. Subject to qualifications they are principles actually embodied in the Constitution, the result of a long tradition based on a large experience. It is not the function of the constitutional lawyer, as such, to advocate any political principles. His function primarily is to analyse, to find out what are the principles upon which the Constitution, as it exists, is based. Dicey honestly tried (in *The Law of the Constitution*, not in his polemical works) to analyse, but, like most, he saw the Constitution through his own spectacles, and his vision was not exact. The growth of the new functions of the State has made much of his analysis irrelevant. Moreover, the argument from history or, what is the same thing, from the Constitution must be used with discretion. To say that a new policy is "unconstitutional" is merely to say that it is contrary to tradition, and it must always be considered whether the tradition is relevant to new circumstances. Even if the rule of law as Dicey expounded it had been exact, it would not be a sufficient argument to say of any proposal, as the

Committee on Ministers' Powers said on a minor point, that it was contrary to the rule of law. The real question is whether a proposal is or is not suitable to new conditions, given the fundamental assumption on which proposals must be made, that of the democratic system. The "principles" of constitutional lawyers are always a dangerous foundation for the formation of policy.

A NOTE ON THE THEORY OF LAW

THERE is implicit in many paragraphs of this book a theory of law which ought to be made more explicit. Such a theory cannot properly be expounded in less than a book; but a few notes may assist the reader. It should be explained at the outset that we are not concerned only with the analysis of "English law," about which something has been said in Ch. III. Practising lawyers and, indeed, most private lawyers—Austin, for instance—are content to rest the law upon authority. Legislation is law because it is enacted by Parliament; the common law is law because it is enunciated by the courts; and it is unnecessary to examine too closely why Parliament and the courts have power to make law. Similarly the private lawyer, the criminal lawyer, and even the administrative lawyer in a country with a written constitution need go no higher than the Constitution itself. It is fundamental law, and rules made in accordance with its terms are law. If the jurist chooses to define law in terms of authority, no harm is done. Constitutional law and international law are in that case wrongly named. Also, it is unlikely that a definition can be obtained to suit every system of law—that is, every kind of constitution; certainly no such definition has been successful in receiving general acceptance. But a definition is intended for personal use; and if a jurist proposes to use a term in a specified manner he is perfectly entitled to define it as he pleases. Also, there may be accepted definitions in any given system. English lawyers may possibly use "law" in a certain sense—though we

have seen that it is not easy to draw precise boundaries; and in that case "English law" will be definite, but then the term "law" will not necessarily be capable of export.

It should be noted that even if it were, law in this sense develops very late in the history of civilisation. In primitive societies the governing rules are customary. They are frequently regarded as having a divine origin, and the notion of an authority having power to make laws develops only when the relations between divinity and political authority become closer. Even where this is not so, the notion of law-making is a late development.¹

In any case, a constitutional lawyer or political scientist cannot be satisfied with a definition based upon authority, for he is concerned essentially with that authority. It is his business to explain or even to justify it. The practising lawyer is in fact dependent upon him for this purpose. He has to determine what are the fundamental norms which govern the political authorities. Until it is established what authorities have power to make laws and what kinds of power they possess, the practising lawyer has no means of knowing what is the law with which he is concerned. In England the task is not very formidable because the political authorities have been established so long that they are known to everyone, and their powers are reasonably clear. This function of the constitutional lawyer has therefore been under-emphasised.² Nevertheless, it be-

¹ See an excellent essay by C. W. Westrup, "Sur la notion du droit et sur le mode primitif de formation du droit positif, c'est à dire du droit dit positif," *Revue de l'Histoire du Droit*, Vol. XI, pp. 1 et seq. See also Sidgwick, *Development of European Polity*, Lecture XII.

² Professor Ernest Barker (Introduction to Gierke, *Natural Law and the Theory of Society*, Vol. I, pp. xviii-xxii) has drawn attention to the fact that in England political science has received little assistance from the lawyers. There are many reasons, some of which are mentioned by Professor Barker. One which he does not mention is that the lawyers have had their fundamental notions settled for them for a long time.

comes important when it is realised that British political institutions are not governed by the laws of England or "lawyers' law" alone, but that some of the most important constitutional relations are determined by conventions.

So far as I am concerned, the processes of explanation and justification are different, and relate to different branches of knowledge. The process of explanation is the function of constitutional law (or jurisprudence) or of that part of political science which is concerned with the actual working of institutions¹; the process of justification belongs to political theory (or the philosophy of law) or to that part of political science which relates to the theory of institutions. The difference is one between facts and subjective theories. Ideas are in themselves facts. Indeed, laws are nothing but ideas, whether they are put on paper or enshrined in the hearts of priests or judges. It is extremely easy to prove the subjective element in the judicial process, whether in the development of common law or in the interpretation of legislation. Nevertheless, the social scientist, like the natural scientist, must assume the existence of reality. He must assume, also, the nature of causation, at least so far as to assert that he can assume the nature of a person's ideas from his statements and actions. Given these assumptions, there is a difference

The revolution settlement embodied the mixed or "free" Constitution in the law, and no great revolutionary ferment has caused the lawyer to examine his fundamental ideas. There has been a unified and uncontested political and legal system in existence for nearly 200 years, and English lawyers have been able to concentrate on "lawyers' law." Moreover, the victory of Parliament was also the victory of the civil courts, and the lawyer has thus been a diligent student of judicial decisions. When he is bored with them, he tends to become a legal historian.

¹ I make no distinction between the more general parts of constitutional law—general public law or *allgemeine Staatslehre*—and the study of political institutions.

between the idea which I have of the nature of the universe and the purposes of human society (if any) and the ideas which appear to be generally adopted in any particular political society for the regulation of human behaviour. The principle of utility, to take an obvious example, has been shown to be untenable as a principle of moral philosophy; but it might nevertheless be shown either that people do in fact generally seek their own happiness or that no other principle can be adopted for purposes of legislation in a democratic country.

I appreciate the strength of the argument in favour of absolute standards of right and wrong, obtainable by the exercise of reason.¹ It must be admitted that if they exist they must be *per se* binding on humanity and may reasonably be called law—*natural* law, if it be so desired. If they exist, it is no doubt the business of political and legal philosophers to find out what they are. There is, however, a difference between the ideas which people accept and the ideas that they ought to accept. A Zulu lawyer is concerned with the ideas of the Zulus, not with those of the Papal Encyclicals. Nor, unless he is a missionary in his spare time, is it his business to teach them that they ought to adopt the principles of the new Irish Constitution. The fact that, if the Zulu had a perfect reason and followed it, he would obey the rules laid down by the learned canonists, is undoubtedly of very great importance, but it does not help to an understanding of the nature of Zulu law if it is built on entirely different principles.

The argument that because the principles of natural law are binding they *must* inevitably be followed is not impressive. It is a little difficult to say whether or not they

¹ Nowhere put more persuasively than in Morris Cohen, *Reason and Nature*—all the more persuasively because, unlike most of those who uphold the doctrine of natural law, the author was not trying to support anybody's political, economic, or ecclesiastical pretensions.

are followed, because, human reason being imperfect, nobody knows what they are. The authorities appear to include the principles of liberty, equality, *pacta servanda*, and private property, but they are by no means agreed as to what these mean. It appears to be possible to contend, to take the least contentious, both that a treaty signed under threat of war is a treaty and that it is not a treaty, and both that private ownership in land is a vice and that, in the same circumstances, it is a virtue.¹ In any case, it is worth while to find out what principles are in fact followed; if they are the same throughout the world, then *ex hypothesi* they must be the principles of natural law, and if they are different, it cannot be said that the principles of natural law must inevitably be followed.

All this leads to the conclusion that a sociological method should be followed. The word frightens many lawyers, who are not always aware that in finding out the principles in the decisions on civil conspiracy they are using a sociological method. The sociological process is simply to examine the facts, including the ideas, of any given society. A jurist or a constitutional lawyer, unlike the practising lawyer, is not concerned with the set of ideas possessed by lawyers alone, but with the ideas of people generally. If this method is adopted it will be found that, for reasons which can be sociologically explained, there are in every

¹ An example may be drawn from a famous English decision, the *Case of Shipmoney* :

"The Method whereby I may maintain the Right of my Master, and the Crown, is this; I shall first ground it upon Reason; every human Proposition is of equal Authority, only Reason makes the difference." (Littleton, Solicitor-General, for the Crown.)

"I will prove it from Reason, which is the Master of all Authorities, as Mr. Solicitor said." (Holborne, for Hampden.)

Trial of John Hampden, pp. 50, 65.

Precisely; but whose reason, Littleton's or Holborne's, the King's or Hampden's?

society reasonably agreed rules of conduct which are accepted by the individual as obligatory not only on himself but also on other people. In advanced political communities they include rules enunciated by political authorities or by experts. The rules of the Bills of Exchange Act are not to be found in the common consciousness of the people; they have nothing directly to do with the national spirit; they are not adopted by the people because they spring out of a sentiment of social solidarity or sentiment of justice; they are not "willed" by the people as individuals or as a corporate entity; they are just made by Parliament. If a sociologist asked a citizen from Hoxton whether the Bills of Exchange Act was "law," something like the following colloquy would ensue:

Citizen: "Never heard of it."

Sociologist: "It's an Act of Parliament."

Citizen: "Them politicians is always making new laws."

Sociologist: "Why do you call it a law?"

Citizen: "Because them — politicians made it, I suppose; that's what they're paid for."

Very likely the worthy citizen believes that all the laws come from Parliament. He would not know that the rule in *Donoghue v. Stevenson* came from the judges. If, however, he started to take his wife to Southend in his side-car, and he found that owing to the negligence of a garage hand he on the cycle and his wife in the side-car went in different directions, he would decide to "have the law on" the proprietor of the garage, and would consult a solicitor. The solicitor would probably not tell him whence the rule came, but he would know that the citizen would have a right of action because three judges in the House of Lords had said so. It would be law for him, and therefore for the citizen from Hoxton, because it had been made by a recognised authority.

The citizen from Hoxton has but the vaguest notions

about the general principles of the law. The general ideas of those parts which definitely affect him are fairly simple. He knows that, having agreed to occupy a house he must pay the agreed rent and not use the doors for firewood, that if he calls for a glass of beer he has to pay for it, that when his wife pawns his Sunday suit he can get it back by repaying the money and the commission, that he must not hit a constable on the nose, that he must not walk into his neighbour's garden or break into his house, that he must maintain his wife unless she leaves him or he turns her out for adultery, that he must not hit his aged mother on the head with a hammer, and so on. He is, perhaps, an expert on the finer points of the more lurid parts of the criminal law, since he makes a special study of them in front of the kitchen fire every Sunday morning. If he is in doubt on any other point, he consults a friend, or looks it up in the public library, or even, in case of serious difficulty, spends a guinea on legal advice. He recognises as law that which is made for him, though he agrees with the opinion of Mr. Samuel Weller as to some of it. For the most part, however, it is a mystery to him in both senses of that word. He relies on the experts to know what the details are. These experts, the members of the mystery, recognise the established political order so long as there is one. If a new order is established by revolution, or by the substitution of one set of political institutions for another (as in an annexation or fusion of States), they recognise the new one. So far as ordinary private relations are concerned, the change of political order makes no difference. English private law developed without a break through the Wars of the Roses, and the same justice was administered in the name of Charles I, the Commonwealth, and Charles II. Nor is it necessary that there be any courts. When, to use a famous phrase, "the course of justice is stopped, and the courts of justice are shut up," ordinary personal relations continue

to be regulated according to traditional principles.¹ Nor, again, is it necessary for all purposes that there be some kind of police. It is common revolutionary experience that when all government is temporarily taken away, as between the retreat of one army and the advance of the other, looting takes place on a large scale; but it is not the common experience that men begin killing each other, or ejecting their wives and children, or committing adultery.

Neither the citizen from Hoxton nor (if he be a true cockney) any of his forbears for the past eight generations has had any revolutionary experience. He lives in a society where law and order have been maintained for centuries. He is not one of Cromwell's Ironsides, but a good family man intent on earning his living in a peaceful vocation. If we examine his motives for obeying the laws as he understands them, we shall find that they are usually mixed, but that the potential force of the State is only one among many. There are, no doubt, some rules which he does not obey or would not obey if he could break them, though he understands their general character. He sees no harm in a little bet, and he fails to understand any real distinction between street betting and credit betting, or between gambling on the Stock Exchange and on horse races. He probably has no objection to buying a drink outside prohibited hours. If he obeys the law on these matters, it is probably for lack of opportunity to break them. No policeman or court can stop street betting in

¹ "Every State has, as it were, a double framework of order, a code and a constitution, the thing administered and the agency of administration. The former grows quietly underneath, although storms rage around the other. Even the most violent revolutions leave the bulk of the code intact, when they overthrow the agency which hitherto guarded it. The most permanent, as it is also the most conservative, character of the State is its body of law." Maciver, *The Modern State*, p. 99.

the East End of London unless street bookmakers can be prevented. There are, however, so many potential bookmakers that it is not in fact prevented. When the policeman approaches the street the word goes round that the "cop" is near, and the bookmaker's runner finds temporary shelter in a hospitable home. When the "cop" passes on, business is as usual. The licensing laws are generally obeyed because licensees are few and vulnerable. The sanction which is effective with them is not the monetary penalty inflicted by the court, nor yet the disapproval of society (for generally speaking society does not disapprove), but the fear of losing the licence, a possibility which involves deprivation of livelihood.

If, however, the citizen from Hoxton is a really good citizen, he will obey laws simply because they are laws. There are many drivers of motor vehicles who always conform with the speed limit in built-up areas, not because of the possibility of detection, nor necessarily because they believe the rule to be reasonable, but simply because it is law and they accept the principle of obeying all laws which do not offend their moral sense.

He may have quite a different reason for keeping to his near side while going round a blind corner. Here he recognises the necessity for a rule, though the left-hand rule is morally no better than the right-hand rule. If he does not follow it, he runs the risk of collision. He thus runs the risk of a prosecution for dangerous driving and of an action for damages for negligence; but primarily he does not want to collide, with the risk of physical injury to himself and his vehicle, nor does he want to lose the no-claim bonus under his insurance policy. The possibility of legal proceedings is of less importance.

There are many rules to which he desires to conform because he obtains benefits. The fact that there is an obligation to send to school a child of a certain age is now

of comparatively small importance, and the penal sanction is relevant to very few parents. The present social tradition is that it is advantageous to the child to be educated, and there are few parents who are not anxious to make use of the free service provided by the State. Similarly, most workmen are fully prepared to pay the small sums necessary for social insurance. Here, however, motive is quite unimportant, because so long as they are in employment they simply have not the opportunity to disobey, and the penal sanction is intended for employers, not employees.

General commercial and social intercourse is built up not on law but on mutual confidence. A manufacturer, a shopkeeper, or a dealer refrains from supplying inferior goods or engaging in sharp practice because he has a reputation, a goodwill, to lose. In his relations with his customers he does not stand on the letter of the law. He adopts the principle that a satisfied customer is a good customer. He is willing to accept the return of goods, or to give extended credit, when he is under no obligation to do so. In other words, he accepts a code of rules which is stricter than that of the law. This applies, too, to all well-founded commerce and industry and to the professions. A threat of legal proceedings in case of dispute is very effective, not because he fears the judicial remedy, but simply because he is afraid that he will lose custom. It is, as he would put it, bad publicity. The sanction applies in rare cases, because normally he would not insist so far; but where it does apply, it is the social sanction and not the judicial sanction which is effective. Undoubtedly there are other businesses which keep just inside, or as far outside as they dare to go, the strict rules of law. The "bucket shop," the flitting tradesman, and the wandering cheap-jack obey the law, if at all, only because there is force behind it.

The above example shows that there are often conventional rules which are stricter than the rules of law, and that frequently the effective sanction, where there is one, is a social sanction. This is particularly true of most personal relations, especially those which arise out of the very nature of modern society. The citizen from Hoxton refrains from hitting his aged mother on the head not because the law says that the act would be murder and that the murderer should be hanged by the neck until he is dead, but simply because he does not think of it and would spurn the suggestion as disgusting if it were made to him. (In fact, he would probably do some useful work with the poker upon the person who made the suggestion.) We need not seek to inquire too closely why he has these "feelings." Partly, no doubt, they are due to the fact that it has been suggested to him from his birth, by every one of society's instruments of persuasion, that murder is wrong and matricide particularly atrocious; but that need not be the whole explanation, for we may, if we please, postulate something called a "conscience" without a merely social explanation. That social tradition does play a large part in developing "feelings" in less important matters is obvious to any person who notices the different attitude to cruelty to animals in different countries and at different periods in the history of this country. The law itself has some influence in establishing and maintaining social conventions. For if the law says that certain kinds of acts are "wrong," there is a tendency to believe that they are "wrong." Moreover, to break the law is itself "wrong." On the other hand, the law usually says that acts are "wrong" because it is believed that they are "wrong." There is thus constant action and reaction between laws and social conventions. Yet a change in social ideas can change the effectiveness of obedience. The enormous reduction in the number of prosecutions for

drunkenness during the past thirty years¹ is not to be explained by better enforcement, but simply to changing social habits, due partly to the high price of intoxicating liquor, partly to the development of more interesting places of resort than the public-houses, and partly to an independent change in public opinion.

The citizen from Hoxton, not having a very original mind, tends to live his life according to the manner of his parents, but subject to such changes as are common among the new generation to which he belongs. Accordingly he does many things because he has always been accustomed to doing them. He not only wears clothes, but also a cap on weekdays and a bowler hat on Sundays and holidays. He probably knows that if he emulated Archimedes and jumped out of his bath to run round Hoxton shouting "eureka" he would either be certified insane or prosecuted for committing a public nuisance, but he is as little likely to go out without his hat as without his trousers. Certainly it is not an offence to walk about in pyjamas, though it is not a common practice in Hoxton. He obeys these and other rules primarily as a matter of habit, but also partly because he does not want to become an object of ridicule. So far as he is not governed by habit—itself a product of social convention—he obeys the convention itself. Here again the existence of a law may help to establish and maintain the convention, but it is the social sanction which matters. The law itself is supported primarily by social sanctions. It is well known that for many people prison is not a deterrent in itself. A modern prison is not a very dreadful place, especially to those who have experience of it. On the other hand, the possibility of being spurned as a "gaol-bird" is a very great deterrent in most classes of society—though here the social sanction has some relation

¹ The average for 1900-4 was 216,424; in 1935 there were 42,120.

to the offence; for there is no very serious sanction imposed upon a person who has been imprisoned for driving dangerously or, apparently, making false statements in a prospectus. At the same time, a rule may be fully sanctioned by society without any kind of legal sanction. It is no offence to have an illegitimate child, yet in most ranks of society it is a most serious social offence. In fact, there is a well-recognised rule that the father must, if he can, "make an honest woman" of the mother.

It cannot be doubted that a small minority of persons is induced to conform with the law, in so far as they do conform, by the threat of punishment. The apparatus of the criminal law is directed primarily against the criminal, or potentially criminal, class. This class consists for the most part of rather exceptional persons, sometimes intellectually under-developed, sometimes (though less often than in the past, owing to the powers of public authorities over children) persons who have been brought up in a criminal environment, sometimes persons against whom the usual social sanctions are for other reasons ineffective. The force of the State does not prevent crime among this class. It makes it somewhat rarer, not only by direct prevention, but also by persuading "old lags" that, as they put it, crime is "a mug's game." The effects of the courts and of the police are, however, primarily directed toward preventing additions to the class. The threat of punishment is itself a deterrent, which is, however, far more effective before the first offence than afterwards. For this reason, modern practice does not encourage the infliction of punishment; it seeks instead to induce the first offender not to repeat the experiment. It is nevertheless true that the force of the State does prevent the criminal class from becoming more than a small minority. When civil order breaks down, as during a revolution, crime becomes much more prevalent—though we must emphasise again that

this applies to certain kinds of crime alone, and does not apply to the whole of the law.

Thus we reach the conclusion that, so far as ordinary citizens are concerned, the enforcement of the laws by the State, though important, is not the primary means by which obedience is secured. Without force, society would rapidly degenerate into lawlessness; but that is because after some time the general habits and traditions of obedience to social conventions of all kinds would break down. Moreover, if such a state of society were to arise, it would take a long time to restore "order." If a modern civilised community were to be without governmental force for a long period, law and order would not be restored as soon as a Government were established. It would create months to establish any semblance of order, and years to restore society to the condition of modern Britain. Force can effectively be used only against a minority. As I have said, street betting cannot effectively be prevented in those parts of the big towns where it is prevalent. The Deputy Commissioner of the Police of the Metropolis informed a Royal Commission that in some parts of London the laws against street betting cannot be enforced.¹ "It is not too much to say," he remarked, "that police action with regard to this form of offence is for practical purposes ineffective, simply because of the largeness of the demand for betting facilities." When the Chairman said to him, "No police action, I gather, can possibly stop the success of the Irish sweepstake in this country"; he replied, "Not only cannot stop it: it can hardly interfere with it in the slightest degree." There, however, he proved to be wrong; for the Betting and Lotteries Act, 1934, established the means by attacking primarily not those who bought tickets, but those

¹ Royal Commission on Lotteries and Betting: Minutes of Evidence (1932), pp. 33-44.

who imported them and, above all, those who advertised the results—especially the comparatively few newspapers, who at once complied (very willingly) with the law. Effectively, what stopped the success of the Irish sweepstake in England was the absence of publicity, and the newspapers obeyed primarily not because they were forced to do so, but because they wanted to do so provided that others refrained.

Enforcement against some means obedience on the part of many others. The instruments of enforcing the criminal law in England are hundreds of courts and tens of thousands of policemen. Even these would be quite ineffective against mass disobedience; but, in any case, enforcement by them implies obedience by them. If the courts were riddled with corruption and the police themselves lawless, it would be quite impossible to enforce anything. Corrupt and disobedient minorities, even among judges, justices, and police, can of course be dealt with by force; but the use of force to maintain obedience assumes always a force which is obedient.

Finally, and here we reach constitutional law at last, force cannot be used against those who control the force. A Government cannot coerce itself, though a Government can coerce one of its own members. The courts cannot control the Government. They can give verdicts or judgments against it, but they have no force at their disposal save that controlled by the Government itself. Thus even the rules of administrative law, which impose obligations on the State or the Departments of the State, can be enforced only if the Government itself consents. If the British Government decided to strike off the nominations of all Opposition candidates for election to Parliament, or if it refused to abide by the result of an election, it could not be compelled to obey the law if the army remained loyal. The law may be able to prevent revolution against the

Government; it cannot prevent revolution by the Government. A written constitution, with a strict division of powers, may possibly prevent the Government from causing the overthrow of the Constitution. All citizens of the United States in office take an oath to the Constitution of the United States. It is probable, therefore, that if the President of the United States (who is commander-in-chief of the army) decided to sweep away the Constitution, not only the other public officers, but also the army, would refuse to follow. But this would not be because the law could be *enforced* against them. It is indeed possible that the British Army would be seriously divided if it were ordered to enforce any obviously unconstitutional act. It was not certain whether the army would have been prepared as a whole to suppress rebellion in Ulster in 1914 because, though the enforcement of the Government of Ireland Act was legal and rebellion against the Crown illegal, many Unionists (Dicey among them) thought that the Act was passed only through the "unconstitutional" threat to use the King's prerogative of creating peers to secure the passage of the Parliament Act. Where the Government's action was flagrantly unconstitutional and was universally admitted to be so, it would not have the force.

It is true, nevertheless, that a revolutionary body with an army behind it can establish itself by force. Again it must be remembered that it is the obedience of the army which creates the force. Also, force calls for force; and it is reasonably certain that a Government in Great Britain which dispensed with Parliament would find an army raised against it. It would then be in office but not, until it had suppressed the Parliamentary army, in power. Once in power, its force would be useful, but its authority would depend primarily on the willing obedience, not only of the army, but of all its supporters who were given public

office because of their loyalty, and who would then support the Government not merely because of their loyalty but also because their jobs depended upon it. Moreover, the Government would proceed to secure obedience not merely by imposing punishments, but by suppressing unpalatable facts and issuing falsehoods through the instruments of communication under its control. In any case, it would take care not to interfere with habits and traditions which were not of political importance. It would come, or at least it would say that it had come, not to destroy the law but to fulfil it. In due course, therefore, order would be established, and obedience would again be the rule. Its power would then rest not upon force but upon willing consent, though force would, as before, be useful in helping to maintain the attitude of willingness.

Thus, on the one hand, the law "enforced" by the Government does not rest primarily on force; and on the other hand force cannot be used, legally or constitutionally, against the Government. The constitution of a country, whatever it be, rests upon acquiescence. Constitutional laws and constitutional conventions are in substance the same, though there are incidental differences already explained in Ch. III. The fundamental difference between a democracy and a dictatorship rests in this: that the people in the democracy are free to learn what facts they please about their own system of government, and to change it if they can think of a better, while in a dictatorship there is suppression of information, suppression of freedom of thought, and therefore the absence not merely of establishing a different system, but of learning whether there are any arguments in favour of another.

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